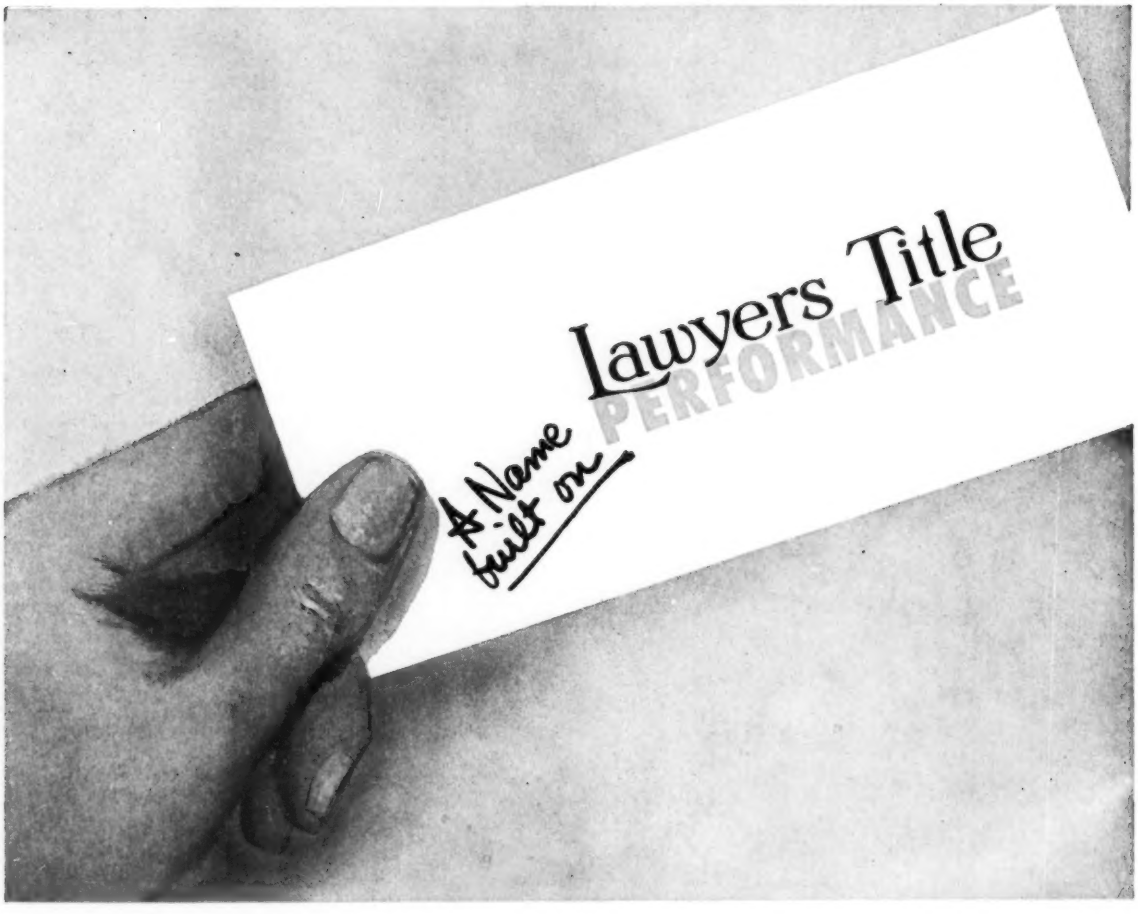
American Bar Association Journal



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This Month's Cover

The drawing on this month's cover is of Sir Edward Coke (1552–1634), barrister, judge and reporter, one of the greatest common lawyers of all time. His *Institutes* (the first volume of which is known as *Coke Upon Littleton*) is the basis of a great deal of what we have come to know as the common law. As the first Lord Chief Justice of England, he informed King James I that even the king was subject to the law. His Bill of Liberties, introduced in Parliament near the beginning of the English Revolution, ultimately took the form of the famous Petition of Right, one of the great documentations of the liberties of Englishmen. The drawing is by Charles W. Moser, of Chicago.

December, 1955

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The President's Page

E. Smythe Gambrell

■ When this reaches you Thanksgiving will have passed and the Christmas season will be almost upon us. It is a time for celebration and for reflection upon the many good things with which we are blessed—a time for happy, festive gatherings of families and friends in the warm glow of "peace on earth, good will toward men". On behalf of all the officers of the Association I extend cordial greetings to every member and express the wish that each of you and your loved ones will enjoy at this holiday season a full measure of the spiritual and temporal blessings which add grace to living.

We confidently look forward to having a vastly enlarged American Bar Association "family" long before another Christmas holiday season rolls around.

Through the unanimous action of the Board of Governors at the October meeting, the Association has set in motion a dramatic and unprecedented campaign to double its membership in the next three months. The broad outlines and objectives of the program now have been laid down. Much of the campaign mechanism already has been created. At this moment leaders of the profession in every section of the country are rallying to support and actively take part in this great organizing effort which has no parallel among national professional groups.

The goal is 50,000 new members of the Association before the end of February. This is no visionary target plucked from thin air. It is realistic and was arrived at after careful examination of our potential. To achieve it we need to enroll approximately one out of every three lawyers who are not now members of the Association. Our present membership is about 58,000; the number of non-members is approximately 180,000. As I have pointed out previously on this page, we are far behind other professions in national organization enrollment. The medical profession has in its national association 83 per cent of its membership, the dental profession 86 per cent, the osteopaths 72 per cent, and the accountants 50 per cent. We have only 24 per cent.

The philosophy that underlies the campaign represents an historic advance in Association membership policy. We are saying in effect to every lawyer of good standing in the country: "We want you in the American Bar Association. We want your active interest and participation in our work, your brains, your moral influence, and your financial support of the enterprises in which we are engaged to strengthen our profession and its usefulness and to discharge our public obligations."

The membership campaign is being carefully and thoroughly organized. The first phase, between now and February, will see the establishment of an organizational structure in every federal judicial circuit, and every state, county and city. During this period teams of workers are being recruited to personally interview non-members. All organizational preliminaries are being pointed to one climactic week—February 10 to 17—when these teams will go forth simultaneously in every locality for a short, intensive solicitation to meet fixed quotas for each geographical area.

If any non-members are missed in this personal canvass, they will be reached through an additional mail solicitation. Our aim is that every American lawyer in active practice and in good standing be invited to join the Association.

Why do we seek to double our membership? Why is it essential to have a majority of our profession within our national association? The simple answer is that the legal profession is not now, and never has been, organized nationally to do the things it could and should be doing. Our profession is in danger, in today's rapidly changing social and economic order, of losing its identity as a group of men and women exclusively recognized as qualified to render legal services. The time has come when we must have a truly strong, vigorous and resourceful national organization to meet growing demands from the public and the profession itself for services that only a representative national bar organization can perform. We need more "muscles", for example, to support our fine state and local associations in improving the administration of justice, in maintaining professional standards, in strengthening discipline, in providing more facilities for continuing legal education and

(Continued on page 1143)

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation, and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $3.00; Criminal Law, $2.00; Insurance Law, $5.00; International and Comparative Law, $3.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral Law, $5.00; Municipal Law, $3.00; Patent, Trade-Mark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $3.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

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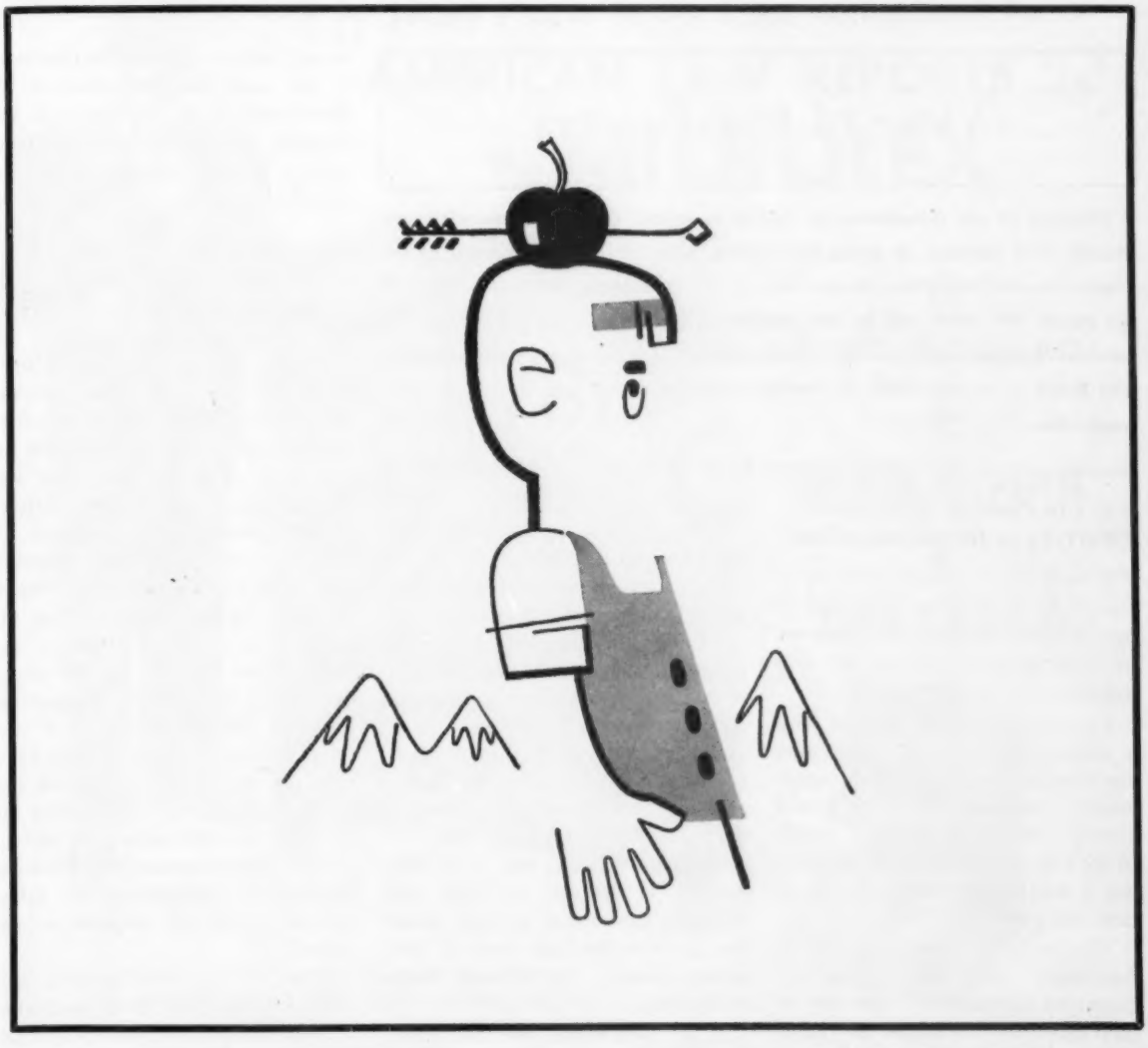

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

G.I.'s in Foreign Prisons— "Martyrs to Internationalism"

■ This letter is in opposition to Lt. Joseph E. Ross' letter published in the October issue of the JOURNAL in your column "Views of Our Readers".

I do not believe Lieutenant Ross is sufficiently informed concerning the so-called "Status of Forces Agreement", commonly referred to as a "treaty". Mr. Ivan Bowen's article in the February issue of the JOURNAL was a well-written article based on fact, not mere opinion.

The so-called "Status of Forces Agreement" does not in any way guarantee our military men any of their constitutional rights, but rather it is a complete abrogation of their rights. I refer Mr. Ross to a statement by Frank T. Bow, July 13, 1955, before the House Foreign Affairs Committee, *re* House Joint Resolution 309, to revise the above agreement and take away the criminal jurisdiction that foreign countries now have over our Armed Forces personnel stationed within their boundaries. I urge Mr. Ross to read Mr. Bow's statement. Mr. Bow gives the true facts, cites authorities and at least fifty-eight instances where servicemen were deprived of their constitutional rights as Americans, sentenced and convicted under foreign laws, and are now confined virtually incommunicado in filthy, unheated foreign prisons without proper food or medical care. Mr. Bow calls them "martyrs to internationalism".

I do not say that these men should not be punished for the crimes they commit on foreign soil, but I do say that they should be tried according to the law of their own country, judged by their own peers and sentenced to a prison in which they will at least be given a substantial meal and have heat in the winter time. Even though they have committed a crime and should be punished, they are still Americans, they are still human beings, and I say they should be treated as such, and can only be treated as such under the Constitution and laws of their native country, the United States of America.

If Mr. Ross would like some more facts and not mere fiction or hearsay, I advise him to read Mr. Bow's article, or write me direct at 2610 Dublin Street, New Orleans 18, and I will clear him up on the matter. . . .

WILLIAM W. IRWIN, JR.
New Orleans, Louisiana

Reimbursement for Expenses in Litigation with the U.S.

■ Despite increasing recognition that the maxim "the King can do no wrong" is no longer—if it ever was—a suitable expression of the relationship of government to citizens in our democratic society, we have failed to consider certain types of governmental activity which result in financial loss to individuals without any pretense of reimbursement.

Each year a relatively large number of our citizens (and corporations) deem it advisable to challenge in the courts the correctness of the determination of their federal tax liability by the Internal Revenue Service. Many of these taxpayers are successful in the courts with the result that the tax liability as determined by the Internal Revenue Service is found to have been in error, yet the correction of these errors by the courts leaves the taxpayers less well off than had their tax liability been correctly determined initially because they have been subjected to expenses in preparing their case for trial, and attorney's and other fees in connection with the trial. Under present practices the taxpayer receives no adequate reimbursement for these out-of-pocket expenses which in fact are incurred for the purpose of insisting that his tax liability has been incorrectly determined. His victory in the courts demonstrates *ex hypothesis* that the original determination by the Government was in error. Would not concepts of fairness dictate that the taxpayer be reimbursed for actual (not to exceed reasonable) expenses incurred in prosecuting tax litigation in which the taxpayer is victorious?

Many of our citizens each year who are prosecuted for alleged criminal offenses are acquitted. Acquittal, however, in no sense leaves the citizen at the same place that he was prior to the unsuccessful criminal prosecution. Our concept of justice embraces the idea that acquittal of a criminal charge indicates that guilt was not legally established. The requiring of criminal defendants to bear the cost of their defense imposes an unfair burden upon defendants whose lack of guilt has been demonstrated by acquittal. Would not essential concepts of fairness dictate that the actual (not to exceed reasonable) expenses incurred in the successful defense of criminal prosecution be reimbursed by the government?

It is submitted that the adoption of these modest proposals would contribute greatly to making justice

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in fact a matter of right rather than grace.

HENRY N. WILLIAMS

Mercer University
School of Law
Macon, Georgia

Disagrees with Mr. Sobeloff on the Criminally Insane

■ With reference to the article and the editorial in the September issue on insanity in connection with crime:

A responsible person who has proved himself a menace to society must be segregated. Of course, the hideousness of incarceration is obvious, but is it awful to be locked up as guilty of a crime but quite socially acceptable to be locked up as irresponsible? Directly all that matters much is that the menace be locked up.

Indirectly, of course, it makes a big difference in two ways. First, we want to be as right as humanly possible. But, in the rapid progress of mental science, we know we cannot now reach the ultimate solution. It is not even undesirable that the law lag a few years behind the alienist who has become a psychiatrist and thinks himself the last word. Maybe he is not the last word and certainly he is not the final word.

Second, the incidents of conviction and of adjudication of insanity are quite different. Conviction carries with it many things, among others the possibility of the parole and the certainty of release of one who may be still a menace. Adjudication of insanity also carries with it many things, among others the possibility of release by a psychiatrist who believes in himself and wants cures and hopes that the patient, although he will not certify him as surely responsible, has been "rehabilitated" enough not to be a menace—which can only be determined by releasing him on society. The article puts it, with emphasis added, "ultimately a medical judgment that the person is *not likely* to offend again".

All of us join most heartily in the discussion, but not on the basis that "the dignity of the individual" is at stake. Would you rather be incarcerated in the "hoosegow" or behind the "booby hatch"? *De gustibus non est disputandum.* If we want to go quite "modern", should we not treat both institutions as mental institutions? In other words, is not our present problem to improve both institutions without giving too much attention to the impossible task of just which one is to be used in borderline cases?

FRED ARMSTRONG

St. Louis, Missouri

She's Not Worried About Hysteria

■ He is a brave man, indeed, who would risk his all in these "times of national anxiety and peril", when our freedoms have only their "bones" left, and our society is "afraid, uncertain and anxious", to write the article which Mr. Sol M. Linowitz did for the September issue of the JOURNAL.

Has hysteria really affected the au-

(Continued on page 1102)

(Continued from page 1100)

thor as it has his article? Or is he merely repeating the hackneyed howls of the "liberal" anti-anti-Communists, whose energy is spent slandering informants who supply us with valuable data on the Communist conspiracy?

It is to be noted that these same "liberal" anti-anti-Communists are the very folks who continually urge more and more Federal Government intervention, and who espouse more and more socialistic panaceas, all of which are vital threats to our liberties.

Mr. Linowitz would have been more to the point if he had voiced fears for our liberty, as a result of the insidious big-government concept favored by the "liberals". He would have done better to echo the apt words of Loyd Wright in the latter's Annual Address [41 A.B.A.J. 800, September, 1955]:

> We have drifted down the path of paternalism, looking more and more to security, wherever or however it may be found, and abandoning the good old American traits of thrift, dignity in work, independence and pride of accomplishment, and the joy of succeeding by overcoming all obstacles.

GERTRUDE J. BUCK
Bayside, New York

He Liked Mr. Tenney's "Laugh-Producing" Article

■ In the September issue of the AMERICAN BAR ASSOCIATION JOURNAL is an article by Henry F. Tenney of the Chicago, Illinois, Bar, entitled, "The Client's Eye View: What Every Lawyer Should Know".

I have been taking the JOURNAL for a great many years, and I think that is one of the finest articles that has ever appeared in the JOURNAL. I mean by that that the humor is so clever and so splendid, and so laugh-producing that I am sure the entire Bar Association will thank Mr. Tenney for having written it and also thank you for having published it.

WILLIAM H. ATWELL
United States District Court
Dallas, Texas

Some Thoughts on the Uniform Divorce Bill

■ With reference to the article in the March issue of the Journal "The Uniform Divorce Bill: A Proposed Solution for Our Divorce Muddle" put forth by the National Association of Women Lawyers, I think that no uniform divorce law is going to settle our matrimonial troubles. The plan, as proposed, has a number of unworkable features and defects. In the first place, anyone who has a valid divorce has a divorce which is good in every State; just as a person who is validly married under the laws of any state (or even country) is validly married anywhere in the United States. The emphasis is being put upon cases where people can not secure a good divorce in their home state and attempt to secure divorce of questionable validity in other states.

The article, in referring to the diagnosis made by William G. Ruymann, of the Nevada Bar, says that "Most of the confusing state of divorce law in this country is due to

the Full Faith and Credit Clause of the Constitution." The foregoing, of course, is not true. The Full Faith and Credit Clause will protect any good divorce any place—the trouble is that attempts are being made to give stability to divorces of doubtful legality. The further statement taken from Mr. Ruymann that "The decisions of the Supreme Court which he hopes will solve the question of migratory divorces have done nothing so far but add to the existing confusion" is also not true. The fact of the matter is that with the decisions of the first and second *Williams* v. *North Carolina* cases, the *Sherrer, Estin, Coe* and *Kreiger, Esenwein* and *Muelberger* cases have completely set these matters at rest. There is nothing near the confusion that existed prior to 1948 especially having got rid of the old concept of "matrimonial domicile" expounded in the *Haddock* case.

The Supreme Court of the United States in *Pennoyer* v. *Neff* established that the full faith and credit clause of the Federal Constitution operates the same on divorce as in other matters. The foregoing, of course, is based upon domicile and Mr. Justice Jackson, dissenting in *May* v. *Anderson,* said that "If our Federal System is to maintain separate legal communities as the Full Faith and Credit Clause evidently contemplates, there must be some test for determining to which of the States a person belongs. If for this purpose, there is a better concept than domicile we have not hit upon it."

The article states that "The most outstanding feature of this Uniform Divorce Bill is the therapeutic approach which it adopts. Parties should be able to come to court, not for a fight but for help". The proponents of these Uniform Bills lately have become quite obsessed with such phrases as the "Therapeutic Approach", "Cool offs" and such others. Their proposals would not be adopted by any state because it contemplates abolishing all grounds for divorce, abolishing the defense of condonation and recrimination. In other words a suit is filed and the matter is continued for six months, during which time social workers, psychiatrists and others will work on the parties. If they report

(Continued on page 1153)

Specialization in the Law:

Control It or It Will Destroy the Profession

by **Charles W. Joiner** · ***Professor of Law at the University of Michigan***

■ **In 1954, the House of Delegates directed the Board of Governors of the Association to prepare a plan for the implementation, organization and financing of a plan of regulation of voluntary specialization in the various fields of the practice of law. Such a plan was prepared and was published in the Advance Program for the 1954 Annual Meeting of the Association, but it was not presented to the House of Delegates because of numerous requests from many groups, both within and outside of the Association, to be heard on the subject. The Board of Governors has now conducted a hearing on the plan and has reached the conclusion that it is not feasible.**

Professor Joiner's article was written and accepted by the Journal before the Board reached that decision. He discusses the plan which the Board had under consideration, but most of his article is concerned with the threat that the present unregulated, unrecognized system of "specialization" presents to the Bar. The public wants the expertise that the legal specialist can offer, Professor Joiner finds, and the Bar should act now before large numbers of well-entrenched societies of specialists make regulation of specialties difficult if not impossible.

■ The American Bar Association must take steps to give guidance to the specialized practice of law or risk having the profession and the American Bar Association ripped asunder. Inaction at the present time will be equal to a vote for the uncontrolled splitting of the profession and its organization into separate warring groups competing for clients. Startling statements? Yes, but statements not difficult to establish. It is time that this problem is brought out into the open and frankly discussed by lawyers. Two years ago I pointed out the improvement in medical education and practice resulting from the medical specialty program and how similar benefits could come to the legal profession if the American Bar Association asserted its leadership.* This discussion points up the results of delay in facing the problem of specialization. My text is:

> Just while we talk the jealous hours
> Are bringing near the hearse and flowers.

Lawyer Adams has a general practice and substantial experience in the trial of negligence cases. One of his few corporate clients proposes to consolidate with another corporation. They want his advice on this matter. Very likely unless he has carefully followed the tax laws, he will consult his lawyer friend, Tead, a "specialist" in tax matters, as to the tax consequences of such a consolidation and ask suggestions as to means by which it can be accomplished with the most tax benefits. In so doing, Adams and Tead form, in effect, an *ad hoc* partnership, an association with each other for this special purpose to give them the benefits of a partnership in this special case. Why does Adams do this? It's because he has been "specializing" in a field other than tax law, and he wants his client to have the benefit of the advice and experience of one who has been "specializing" in tax law.

Examples of specialization are numberless. All that is meant by specialization is the concentration of a lawyer's practice within less than all of the fields of law. As a result, he expects to be more proficient in the particular fields of his practice than if he had devoted his time to all fields of the law.

Besides being more proficient, Adams "advertises" his specialty in the back of the *Martindale-Hubbell Law Directory*, and he belongs to an organization of lawyers "specializing" in trial practice.

* *Specialization in the Law? The Medical Profession Shows the Way*, 39 A.B.A.J. 539 (1953).

More and more Adams and others like him are devoting their time and energy to the activities of their own specialty organizations. Less and less they are concerning themselves with the problems of the profession generally through the state and local bar associations and the American Bar Association. As a result of the nature of these "specialty" organizations, the energy of fine lawyers is being diverted from the problems of the profession generally to the problems of their own special fields.

The foregoing is typical of today's practice. There may be nothing startling in it, but I think it is fair at this time to ask some questions. It is also fair to expect answers from the Bar as a whole.

Do lawyers today limit their practice? In large cities? In small towns? Is it wise that they do? Are lawyer specialists more proficient in the limited fields of practice? Is there danger of their becoming "inlooking", of not seeing the relationship of their specialty to society in general? Should guidance be given to the intelligent development of specialties and the control of specialization? Should this guidance come from the American Bar Association? Should the specialty groups go unrecognized by the American Bar Association, leaving their control and guidance to other organizations not representative of the Bar generally and not subject to its control? Should we not expect the American Bar Association to provide a device which would give the public and the Bar the advantages of specialization through the use of some kind of standards to guide and control the program in such a way as to strengthen the profession and its great professional organization? Would the establishment of standards of education, practice, and proficiency, controlled by the Bar generally, be helpful in the control and guidance of specialization for the benefit of the public?

There are basically four problems that must be looked at. One, how widespread is the idea of specialization? Two, is specialization good or bad for the profession and the public? Three, are the organizations which are mushrooming in each of the various specialty fields a satisfactory means of controlling and guiding this trend towards specialization? Four, are there better ways of guiding and controlling the so-called specialist in order to be certain that the profession will not be split asunder and yet assure the public of high quality professional experience?

Specialization . . . *We Have It Now*

It is crystal clear that specialization as thus defined does exist today. There are many branches of the law in which lawyers concentrate time and effort. A recent examination of three typical cities in the United States in Section 2 of the *Martindale-Hubbell Law Directory* gives some interesting information. In an eastern city of approximately 300,000, a midwestern city of 75,000, and a far western city of 65,000, a total of forty-nine law firms purchased space in this part of the directory. In these forty-nine law firms, twenty specialties were mentioned as being fields of the law in which lawyers feel specially competent. In the order in which they were mentioned they are as follows: corporate, probate, real estate, trial, insurance, taxation, banking, commercial law, appellate practice, administrative law, municipal law, bankruptcy, mining law, patent, trade marks, copyright, trade or unfair competition, utility law, co-operative law, labor law. These are the fields of special proficiency asserted by today's lawyers. It cannot be denied by any responsible person that lawyers in cities of all sizes do specialize. Although they may take cases as they come, although they may consider themselves to be general practitioners, they also profess to be particularly competent in one or more fields of practice.

It is only natural for persons who "specialize" to want to associate with one another in limited professional organizations. Their common interests and common desires naturally lead them to meet together. Through the exchange of ideas they feel that they not only improve themselves, but also help their clients. To a certain extent the American Bar Association has met this need. Through its Sections it has provided a common meeting ground for persons interested in various fields of practice. The Sections are many and varied and to a very large degree cover most of the specialty fields. In recent years, however, it seems that Sections of the American Bar Association have not been meeting all of the needs of those who have become specially proficient in certain areas of practice. Although they have been very valuable, although in no sense should their work be discontinued or curtailed in any way, it should be recognized that they are interest groups as distinguished from proficiency groups. This distinction is of basic importance if we are to understand the need for controlling and giving guidance to specialization. Any member of the American Bar Association having the necessary fee for membership may join any Section, whether or not he has any knowledge of the law therein discussed. Each of the Sections of the American Bar Association contain many "specialists". Each also contains many lawyers who know little or nothing about the law of that Section. Such persons have no desire to become particularly proficient in any single field of practice but are interested only in broadening themselves. Interest is the only real qualification for membership in a Section. It cannot be said that this type of organization is in any sense a specialty organization.

In the past several years, organizations have developed in more than one of the specialty fields demanding more than just interest for membership. Applicants for membership are required to meet certain standards of proficiency. One such group is the American College of Trial Lawyers. When lawyer specialists form organizations limited to persons of similar qualifications, they

are, to a certain extent, establishing a specialty in the law. They are establishing standards which may become accepted throughout the United States, subject to no direction and control by the profession as a whole through the American Bar Association. They may be fine groups and have fine ideals and purposes, but they are establishing separate organizations each of which will establish standards of practice as requisites for admission. The profession may be split into splinter groups unless some degree of control can be exercised by the national legal organization.

Though the problem is not yet acute, when there are separate specialty organizations in the many specialty fields subject to no generalized control by the profession as a whole, it will be too late to exercise that control. The vested interests of separate specialty organizations then in existence will be great. Even today the general legal profession is weakened by the separate organizations. Lawyers have only a limited amount of time to devote to professional and public matters. More and more of that time is being taken by the separate specialty organizations. Less and less of it is being devoted to public service through the organized Bar.

If a specialty organization can be established in the field of trial practice outside the scope of the American Bar Association, there is no reason why it cannot be thus established in every other specialty field. There are rumors that lawyers in other fields of practice are interested in forming other "colleges" of specialists outside the national legal organization. What will happen if jurisdictional disputes arise between the so-called specialty groups? Will not such an arrangement entrench specialists in their specialty? Will not they be likely to interpret problems in the spotlight of their specialty, rather than the floodlight of the law generally?

This is exactly the problem that the medical profession faced in 1934. Specialty organizations had been growing for twenty years in various fields of medical practice as separate autonomous organizations. They were beginning to compete with one another for members, they were beginning to overlap in their definition of the specialties. They were beginning to subdivide. At that late date, the American Medical Association stepped in and gave guidance to the specialty program. Because it was late, it could not exercise all of the control that many doctors today would admit to be desirable. Each specialty group had become so strong in and of itself that compromises had to be made. Most of what is thought of as bad in medical specialization comes from the failure of the American Medical Association to assume leadership at an earlier time.

We are at the fork today. We are late in sensing our arrival there. Already specialty organizations are beginning to form in the various fields of practice, not just interest groups, but proficiency groups. Either we exercise guidance and control over these various special fields of practice so as to turn specialization in law to the good of mankind, or we sit back and risk letting our great profession gradually break up into small competing groups of "inlooking" men, pursuing their specialties without thought of the profession as a whole.

Controlled Specialization . . . *For the Good of the Profession*

Divorced from the specialty organizations, is specialization good or bad? If a distinction can be made between specialization as such and the uncontrolled specialty organizations, can it be established that specialization on the part of some members of the bar is good not only for the bar, but for the public as well?

Lawyers specialize because the public wants specialists and because it is to the lawyers' self-interest to specialize. The public demands specialization in almost every profession and almost every business. This is not the result of any thought on the part of the public, let alone any profound philosophy of life. The public goes no further than to know what it wants. To get what it wants in the highest quality and at the lowest price, it must look to someone who, because he has concentrated his efforts in a limited field, has acquired greater proficiency than he could have acquired had he diversified his efforts. Such a person, because of his proficiency and experience, can give what is wanted with an expenditure of less effort and time and therefore at a lower price. That is why manufacturers confine themselves largely to the same or similar articles, stores concentrate in a given line of goods, salesmen sell at most a few commodities, doctors limit the work they do to a narrow field, architects specialize on structures of a single variety, engineers attempt to be proficient in one department of engineering, and lawyers concentrate in a single or few branches of law.

It all adds up to the fact that lawyers, like everybody else, make themselves specially expert by concentrating in a narrow field because

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expertness is what the public demands and what lawyers must acquire if they want to earn a living. It is merely another illustration of saying that, "Everyone will come to the man who builds the best mouse trap." The probabilities are that this mouse trap builder would not be building the best mouse trap if he had put a large part of his mind and time on the manufacture of elephant rifles and fishing tackle.

One of the objectives of the profession is to help lawyers to become better able to serve the public. This is the whole purpose of the continuing legal education program so enthusiastically supported by the American Bar Association. But there are no nostrums for proficiency in the law. It must come through the hard work of the lawyer himself. To the extent that this work, whether it be in attending institutes or lecture courses, or in studying after hours, or in the actual day in and day out practice of his profession, can be concentrated within a limited field, the greater the proficiency and expertness that can be developed. There are those who bemoan this, but none who can deny it. There are theorists and traditionalists who would like to have the practice of law what it was one hundred years ago and to preserve practitioners in the mold of lawyers of 1850, but most of us are more practical and better prepared to face the facts of life. The increased complexity of modern day society requires that a lawyer limit his activities within a relatively few fields of law if he is to be highly proficient in those particular fields. Even the most old-fashioned of us admits that the public is better satisfied with specialized service.

There can be little doubt that the profession as well as the public will be served, if *some* lawyers limit their practice to certain fields of law. Those who limit their practice become more expert in their fields and acquire more honest satisfaction in performing their services with a high degree of care. Inability to devote a sufficient amount of time to clients' problems is one of the common complaints of the general practitioner. Therefore, in many instances, because of his lack of acquaintance with the particular field of law, he only hopes that justice will be done.

Many of today's partnerships reflect, on the part of the Bar, the desire to specialize and indicate that more adequate monetary returns can be obtained through specialized practice of law. It is not unusual to find in a partnership each lawyer proficient in a different field of law. Department of Commerce statistics show that the income of lawyers engaged in partnership practice may run on the average to almost five times that of lawyers engaged in individual practice. This in part can be attributed to the increased proficiency of such partners making them better able to serve clients and resulting from the fact that they limit their practice to certain fields of law.

Having truly competent persons in various fields of practice available to help those lawyers who still prefer to engage in a general type practice will increase the inner sense of satisfaction of the general lawyer and also increase his income. There are many communities today in which it would not be economical for a lawyer to specialize. There are many lawyers today who would not desire to specialize. This is as it should be. Clearly this should be continued.

Part of the strength of our profession arises from the fact that although its membership is made up of lawyers of varying interests and diversified clients, the majority are general practitioners. A person who is in trouble can call upon his lawyer to help him, whatever the nature of the trouble, whether it result from a charge of wife-beating, evasion of taxes, an automobile accident, a breach of warranty of title, non-payment of rent, or any other of the myriad problems that a client brings daily to a lawyer. Nothing should be done to destroy the ability of the general practitioner to serve the community. A lawyer should be entitled to practice all phases of law even though he is not a specialist, but there should be available to the general practitioner certain members of the Bar, the specialists, who, although they will know much less than he about many phases of the law, will be able to assist him and his clients with problems requiring a high degree of skill.

The medical profession only recently has become conscious of the demise of the general practitioner and is now attempting to develop methods to breathe life into its corpse. This need not happen in the legal profession if the national professional organization will have the courage to develop and implement a plan for the intelligent use and control of the legal specialist.

Objections to Specialization . . . *Misconceptions of What Is Happening*

Society is a series of compromises. The problem is to choose that compromise which offers the most good and the least evil. There are many objections raised to specialization in law. The word "specialize" itself is unpopular. Indeed, it is likely that all lawyers have voiced one or more objections when they first began to think of specialization and its control. The objections to specialization, whether valid or not, can fairly be stated as follows:

1. There is a fear that somehow state enforced sanctions will be utilized.

2. There is a fear that the general practitioner will be destroyed, that the general public will be unable to get full legal services from one man, and that the specialist will be permitted to advertise himself to the public so that the individuals will analyze their own problems and take them to the specialist without the help of the general practitioner.

3. There is a fear that the specialist will weaken the responsibility of lawyers to cleints and that the specialist will take business away from

(*Continued on page 1170*)

Consular Non-Reviewability:

A Case Study in Administrative Absolutism

by Harry N. Rosenfield • *of the District of Columbia Bar*

■ **In this article, Mr. Rosenfield calls attention to an anomaly in American jurisprudence: United States consular officers have absolute discretion to deny a visa to an alien. The situation is all the more peculiar because an alien refused entry at the behest of the Attorney General has certain statutory rights to a hearing, and so, in this instance, a subordinate in an American consul's office has more power than a Cabinet officer. Mr. Rosenfield says that this situation is the result of a historical accident and he urges a change in the law.**

■ Over thirty years ago, Harlan F. Stone warned the Bar against the "dangerous experiments in autocracy in this country, in passing numerous laws under which administrative officers are given extraordinary powers over the liberty and property of individuals without those safeguards afforded by judicial review and by our traditional legal procedure"[1]. As one example of what he meant, Stone specifically referred to the deportation aspects of our immigration laws.

Not long afterwards, Charles Evans Hughes, in his presidential address before the American Bar Association on the subject of "Liberty and Law", also warned against "official caprice":[2]

> . . . we find it necessary ever to be on the alert against insidious encroachments under the guise of official discretion.

Since these warnings of the need for "supremacy of the law—that the agencies of government are no more free than the private individual to act according to their arbitrary will or whim",[3] we have witnessed a major development of administrative law in the United States. Hard-won rights of administrative and judicial review over the actions of officials and official agencies have been established. Yet, a unique vestige of administrative absolutism remains, an anachronistic survival of executive autocracy which has persistently resisted the application of either administrative or judicial review procedures which have been evolved for other fields of administrative adjudications.

In 1917, as a war-time security measure, and for the first time in our history, aliens were required to obtain visas from American consular officers stationed abroad, in order to apply for entry into the United States.[4] This administrative requirement was given statutory form in 1918 as a temporary war-time measure;[5] in 1919 it was temporarily extended;[6] in 1921 it was continued indefinitely after the war;[7] and was written into the basic immigration law in 1924[8] and in 1952.[9]

Although this new administrative procedure was developing contemporaneously with the mounting struggle for internal administrative, and external judicial, review of administrative actions, it is the generally accepted current view that there can be neither administrative nor judicial review of actions by American consular officers in denying visas to aliens seeking to enter the United States[10], even where the

1. Stone, NEW JERSEY STATE BAR ASSN. YEARBOOK (1921-22) 49, 60.
2. Hughes, 50 A.B.A. REP. 183, 189 (1925).
3. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 17 (1936).
4. Joint Order of Department of State and Department of Labor, Requiring Passports and Certain Information from Aliens Who Desire To Enter the United States During the War, July 26, 1917.
5. Act of May 22, 1918, 40 Stat. 559, 22 U.S.C. 223-226(b). See President's Proclamation No. 1473, August 8, 1918.
6. Act of Nov. 10, 1919, 41 Stat. 353 (This act never went into effect.) The Act of June 4, 1920, 41 Stat. 750 set fees for visas.
7. Act of March 2, 1921, 41 Stat. 1217, 22 U.S.C. 227. (This was a rider on an appropriation bill.)
8. Act of May 26, 1924, Sec. 2, 43 Stat. 153, 8 U.S.C. 202. See Executive Order No. 4125, January 12, 1925.
9. Immigration and Nationality Act of 1952, Act of June 27, 1952, Sec. 211, 215, 66 Stat. 181, 190, 8 U.S.C. 1181, 1185.
10. *U.S.* ex rel. *Ulrich* v. *Kellogg*, 30 F. 2d 984 (App. D.C. 1929), *cert. denied* 279 U.S. 868, 49 S. Ct. 482, 73 L. ed 1005 (1929) (mandamus to direct Secretary of State to direct consul to issue visa, denied); *US.* ex rel. *Santarelli* v. *Hughes*, 116 F. 2d 613 (3d Cir. 1940), (dicta); *Segall* v. *Marshall*, unreported (D.C. May 25, 1949, Civ. Action No. 3758-'48); 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1942) 723; Oppenheimer, *The Constitutional Rights of Aliens*, 1 BILL OF RTS. REV. 100, 101 (1941); 52 HARV. L. REV. 833

consul has acted unreasonably.[11] This view prevails despite a contrary provision in the original visa requirement,[12] in the face of a legislative history looking in the other direction[13], notwithstanding judicial statements that a consular officer has no right to deny a visa except according to law,[14] and in apparent disregard of an old statute providing that "if any consul . . . is guilty of . . . abuse of power, he shall be liable to any injured person for all damages occasioned thereby".[15]

Perhaps the basic difficulty is procedural, the difficulty of getting jurisdiction over the consul stationed overseas.[16] In the only visa case known to this author where there was no such jurisdictional problem, the person injured by an improper consular denial of a visa recovered on the consul's bond. *American Surety Co.* v. *Sullivan,* 7 F. 2d 605 (2d Cir. 1925), was an action against the surety on the consul's bond, and the plaintiff recovered judgment for the loss of wages and for expenses caused by consul's having denied a visa through action beyond the scope of his authority.

The 1952 immigration law specifically forbids any administrative control by the Secretary of State over any "power, duties and functions conferred upon the consular officers relating to the granting or refusal of visas"[17]. (For whatever significance it may have in statutory construction, no specific immunity for consuls against judicial review is written into the statute.[18]) According to the Senate Judiciary Committee, which drafted the 1952 Act, even under the 1924 law not only was there no appeal from a consular decision refusing to issue a visa, "but even if the Visa Division [of the Department of State] disagrees with the decision of the consul it cannot order him to change his decision but may merely make suggestions such as where a misinterpretation of the law occurs".[19] The practice within the State Department is not to *direct* a consul to issue a visa, even where his denial is erroneous, but to direct him *not* to issue one if there be possibility of his erroneously issuing one.

Although there has been neither administrative nor judicial review of a *denial* of a visa by a consul, there is in effect a whole chain of both administrative and judicial reviews from a consular *grant* of a visa. The 1924 act, which did not specifically prohibit review of a consular denial, did specifically authorize review by the Attorney General (operating through the Immigration and Naturalization Service) of *all* consular grants of visas. The act provided, in part, that:[20]

> Nothing in this act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws.

The immigration law, thus, requires two separate government agencies independently to interpret and apply the same law to the same person.[21] Therefore, although neither the alien nor his American sponsor has any review as of right from denials of visas, even in instances of palpable mistake,[22] there is automatic and mandatory review of every issuance of a visa. This review of consular grants of visas, by the Attorney General through the Immigration Service, is completely *de novo*[23] and can go to the point of a complete re-evaluation of the evidence presented to the consul, where that evidence tended to support his action and where there was no fraud[24] or misrepresentation, and where the issue is merely a matter of difference of judgment.[25]

The present immigration law thus presents an astonishing anomaly in American jurisprudence. Professor Louis L. Jaffe, of Harvard Law School, Chairman of the Committee on Immigration of the Administra-

(1939); 39 COL. L. REV. 502 (1939); 75 U. PA. L. REV. 368 (1927). *Cf. Silva* v. *Tillinghast,* 36 F. 2d 801 (D.C. Mass. 1929); *U.S.* ex rel. *Polymeris* v. *Trudell,* 284 U.S. 279, 52 S. Ct. 1143, 76 L. ed. 291 (1932). *See also* H.R. REP. No. 1193, 72d Cong., 1st Sess. 1 (May 3, 1932); *Hearings before Committee on Immigration and Naturalization,* House, "Review of Refusals of Visas by Consular Officers", 73d Cong. 1st Sess. 20 (May 18, 23, 1933).

11. *U.S.* ex rel. *London* v. *Phelps,* 22 F. 2d 288 (2d Cir. 1927), *cert. denied* 276 U.S. 630, 48 S. Ct. 324, 72 L. ed. 741 (1928). *See also U.S. ex rel. Gruber* v. *Karnuth,* 29 F. 2d 314 (D.C. N.Y. 1928), affd. 30 F. 2d 242 (2d Cir. 1929), *cert. denied* 279 U.S. 850, 49 S. Ct. 346, 73 L. ed. 998 (1929).

12. In the 1917 Joint Order, *supra* n. 4, 6th par., which first established the requirement for a visa, the consul was specifically directed to grant a visa even where the alien would be excluded upon arrival. From such exclusion, the alien could obtain appellate review.

13. *See* remarks of Congressman Albert Johnson (author of the 1921 extension bill and the 1924 Immigration Act), 60 CONG. REC. 3811 (February 24, 1921). *See also,* Annual Report of the Commissioner-General of Immigration for 1919, 66th Cong., 2d Sess., H. Doc. 422, pages 386-87.

14. See *American Surety Co.* v. *Sullivan,* 7 F. 2d 605 (2d Cir. 1925); *U. S.* ex rel. *Gruber* v. *Karnuth, supra* n. 11. *See also Haff* v. *Tom Tang Shee,* 63 F. 2d 191, 193 (9th Cir. 1933).

15. 22 U.S.C. 1199, which originated in Act of July 20, 1840, c. 48, §18, 5 Stat. 397.

16. *See, Ex parte Gruber,* 269 U. S. 303, 46 S. Ct. 112, 70 L. ed. 280 (1925).

17. Act of June 27, 1952, *supra* n. 9, §104(a), 8 U.S.C. 1104(a). In the Presidential Proclamation of 1918, *supra* n. 5, §4, effectuating the first statutory affirmation of a visa requirement, the action admitting aliens to enter the United States was required to be taken by the Secretary of State or in his name. Nothing was even said of consuls, still less of their unreviewable actions. *Query,* under the provisions of the quoted portions of Section 104(a) what is the authority of the Secretary of State to issue regulations "relating to the granting or refusal of visas" (*Cf:* 22 CODE FED. REG., parts 42-43)? *Cf:* Department of State, Public Notice 142, FED. REG., September 8, 1955, 6589.

18. *See,* 39 COL. L. REV. 502, 505 (1939).

19. *The Immigration and Naturalization Systems of the United States,* Senate Judiciary Committee. SEN. REP. No. 1515, 81st Cong., 2d Sess., 612-13 (1950). *See also U. S.* ex rel. *Ulrich* v. *Kellogg, supra* n. 10, at 986. For a description of an informal, non-appellate and purely advisory "review" by the Visa Division, without any specified procedure, review panels, regulations or public announcement of its availability, see PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME, 149-150 (1953) (hereinafter cited as PRES. COMM. REP.); *Hearings before the President's Commission on Immigration and Naturalization,* 82d Cong., 2d Sess. (H. R. Committee Print 1952), 1889 (hereinafter cited as *Pres. Comm. Hearings*).

20. Act of May 26, 1924, *supra* n. 8, §2(g); Act of 1952, §221(h), 66 Stat. 192, 8 U.S.C. 1201(h).

21. PRES. COMM. REP., *op. cit. supra* n. 19, at page 131.

22. Consuls, like other people, can make mistakes. *See,* for example: *Keating* ex rel. *Mello* v. *Tillinghast,* 24 F. 2d 105 (D.C. Mass. 1928) (mistake of law); *U.S.* ex rel. *Swystun* v. *McCandless,* 24 F. 2d 211 D.C. Pa. 1928), aff'd 33 F. 2d 882 (1929) (clerical error); *Ex parte Seid Soo Hong,* 23 F. 2d 847 (S.D. Calif. 1928) (mistaken form; alien admitted); *U. S.* ex rel. *Dalleo* v. *Corsi,* 55 F. 2d 941 (D.C. N. Y. 1932) (mistake of law in State Department's instructions to consul).

23. *Developments in the Law—Immigration and Nationality,* 66 HARV. L. REV. 661, 662 (1953).

24. Visas obtained by fraud are not valid. *U. S.* ex rel. *Jankowski* v. *Shaughnessy,* 186 F. 2d 580, 582 (2d Cir. 1951); *U. S.* ex rel. *Fink* v. *Reimer,* 96 F. 2d. 217, 218 (2d Cir. 1938), *cert. denied* 305 U. S. 618. 59 S. Ct. 78, 83 L. ed. 395 (1938); *Daskaloff* v. *Zarbrick,* 103 F. 2d. 579, 580 (6th Cir. 1939); *Heizaburo Hiroso* v. *Berkshire,* 73 F. 2d 86 (9th Cir. 1934).

tive Law Section of the American Bar Association, testified before the President's Commission on Immigration and Naturalization, in connection with the non-reviewability of consular decisions, that[26]

> . . . it is almost unprecedented that a power of such vast dimension . . . is granted without any review whatsoever. We have searched in vain for anything comparable to it. . . . It is not only that this is absolute power. It is that it is unco-ordinated power . . . without any power "of co-ordination and control in the upper" hierarchy.

Harold J. Gallagher said in his presidential address to the American Bar Association:[27]

> Our government . . . has certain characteristics: First: it is not authoritarian. The Constitution establishes no final seat of authority in any man or position.

Yet, in a nation which prides itself on being a government of law and not of men, our immigration law continues the opportunity for unreviewable, arbitrary and capricious official action.

The Court of Appeals for the First Circuit said:[28]

> It is as much the duty of immigration officials to admit aliens exempted from the general policy of exclusion as it is to exclude those falling within the excluded classes. Administrative officials may not ignore parts of the statute they are administering. . . .

"It is no doubt true", said a District Court in a case affirmed by its Court of Appeals, and where the Supreme Court denied certiorari, "that the American consul has no right to refuse a passport visa arbitrarily".[29] Despite all this, there is no legal means to hold consuls to the correct performance of their duties, nor any administrative or judicial means, of right, to review arbitrary, illegal or improper denials of visas.

This state of affairs is all the more astonishing if one observes that under the immigration law where an alien must establish something to the satisfaction of the Attorney General, a cabinet officer appointed by the President and confirmed by the Senate, there are customarily both internal administrative review procedures and judicial review of his judgment. But where the same law requires an alien to establish something to the satisfaction of a consul, who is a minor and subordinate official, the statute seeks affirmatively to forbid any form of appeal or review of the consul's action, and even insulates him from administrative supervision by his superior officer, the Secretary of State.

Thus, for example, if as a result of a clear error of law the consul denies a visa there is no legal recourse. But if the highest law officer of the United States Government, the Attorney General of the United States, commits the same error of law in attempting to exclude an alien, there is judicial review.[30] *U. S.* ex rel. *Iorio* v. *Day*[31] will illustrate the point. This was a habeas corpus proceeding to secure release under an order of deportation. The relator had been in the United States from 1902 until 1926. During part of this time he had been imprisoned for violation of the Prohibition Law. In 1926 he visited his native country and in 1927 he reentered the United States after obtaining a visa, having sworn that he had never been imprisoned. Judge Learned Hand, in ruling that the writ should be granted, stated that the issue was whether the facts, if disclosed, would justify a consul in refusing a visa. Not every violation of the Prohibition Law, he stated, was a crime involving moral turpitude. Therefore,

> We conclude that the appellant did not suppress from the vice consul facts which would have justified him in refusing a visa, had he disclosed them. . .

But let us suppose that the alien had disclosed the concealed facts,

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and that the consul took the same erroneous view of the law in such event that the Attorney General had adopted in this very case. In that event, although the Court of Appeals ruled that the consul would not have been justified in refusing a visa, the alien would have had no legal recourse from such illegal refusal of a visa.

Take another type of case. Under the immigration law, a citizen or resident alien is given special rights to apply for a non-quota visa preference for an alien spouse or child.[32] But before the consul may issue such visa, the Attorney General must approve an application by the entitled spouse or parent.[33] If the Immigration Service, to which

25. In the Matter of M-, 4 I. and N. Dec. 532 (1952) (decision by the Attorney General of the United States).

26. *Pres. Comm. Hearings, op. cit. supra* n. 19, at 1566, 1569.

27. *American Liberalism at the Crossroads*, 75 A.B.A. Rep. 331, 333 (1950).

28. *Johnson* v. *Tertzag*, 2 F. 2d. 40, 42 (1st Cir. 1924).

29. *U. S.* ex rel. *Gruber* v. *Karnuth*, *supra* n. 11, at 316.

30. *Johnson* v. *Tertzag*, *supra* n. 28, at 41. It is too early to assess the effect of a developing procedure to station immigration officers of the Department of Justice overseas; if consuls are affected by prospective adverse decisions of nearby immigration officers and deny visas that might otherwise have been granted, the availability of review is further limited.

31. 34 F. 2d 920 (2d Cir. 1929), cited with approval, *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 336, 53 S. Ct. 171, 77 L. ed. 347 (1932). See also *In the Matter of D——*, A-6995468, Board of Immigration Appeals, Int. Dec. 599, June 11, 1954, where consul's view of law was held to be erroneous.

32. Act of June 27, 1952, *supra* n. 9, §205(b), 8 U.S.C. 1155(b).

33. *Ibid.*, §205(a) (c), 8 U.S.C. 1155 (a) (c).

the application is submitted in the first instance, denies such petition for a preference quota visa, the applicant may appeal to the Board of Immigration Appeals[34]. And the Board may direct the approval of such petition even in the face of advance notification by the consul of rejection of the alien's application for a visa.[35] On the other hand, there is presently no review of the consular visa denial in the same case.

One's faith and respect for the consuls (and the Foreign Service) is not at issue. They are loyal public servants, and their tasks of visa issuance are difficult and complicated. Considering that their duty assignments rotate among all the duties of the Foreign Service, including visa-issuance, the consuls have done their work surprisingly well. But even fair and conscientious consuls make mistakes of law and fact. Personal confidence in the American consular staff and in our very able Foreign Service does not excuse sanctioning a procedure which is dangerously wrong in principle.[36] "It is undesirable to permit the possibility of control of human destinies by caprice, prejudice, or mistake, subject to no regulation or review", said the President's Commission on Immigration and Naturalization.[37] Lord Acton said: "Power tends to corrupt; absolute power corrupts absolutely"[38] and Mr. Justice Douglas once stated: "Absolute discretion, like corruption, marks the beginning of the end of liberty"[39]. One need not look to the possibility of subjective or improper bases for visa denials[40] in order to believe that consuls should not remain the last rampart of what Stone called "unbridled power".[41]

This conclusion is reinforced when one examines the nature of the decisions on which consular visa denials are unreviewable. There is a very large number of grounds for denials of visas. They involve complicated, and sometimes unresolved, legal problems of eligibility under the immigration law, as well as knotty determinations of foreign law, such as whether fraud or a crime has been committed or whether a crime involves "moral turpitude". Yet, only 3 per cent of our visa-issuing officers have law degrees and only 1 per cent of them were practicing lawyers prior to their appointment to the Foreign Service.[42] These figures are given not to argue that all government administration should be put in the hands of lawyers, but rather to indicate the unwisdom of giving final and unreviewable authority over legal determinations to persons untrained in the law.

Other unreviewable consular decisions relate to whether a prospective immigrant's entry would be "prejudicial to the interests of the United States", or whether an alien is "likely to become a public charge"[43]; to complicated security issues occasionally involving comprehensive knowledge of foreign political, economic and social movements; and to a host of other issues involving legal and technical knowledge.[44] Despite their important functions, visa-issuing officers are generally junior and subordinate consular officers, with but half the years of service of other consular officers,[45] and assignment to visa-issuing duties is not always regarded as a desirable post within the Foreign Service because of lack of rapid promotion opportunities in some instances.

There is still another important reason why aliens, and their American sponsors, should not be left helpless in the face of administrative usurpation and arbitrary fiat. Chief Justice Hughes once said that fair hearings were[46]

> . . . essential alike to the legal validity of the administrative regulation and *to the maintenance of public confidence in the value and soundness of this important governmental process.*

And Lord Herschell put it succinctly:[47]

> Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it.

Despite the best of intentions, administrative absolutism creates public distrust and a lack of confidence in official responsibility. After the most extensive public hearings held on immigration matters in this country, the President's Commission reported:

> The preponderance of testimony before the Commission is to the effect that in giving complete and unreviewable authority to consular officers, the law and practice fail to conform with traditional American reliance upon fair hearings as a safeguard against abuse of power.

And its conclusion was:[48]

> The Commission finds no persuasive reason why the determination of a consular officer in visa cases should not be reviewed.

The Immigration and Naturalization Committees of both the Senate and the House, at one time, approved bills to authorize review by the Secretary of State of visa denials in cases of close relatives of persons in the United States whose petitions for preference quota visas had been approved by the Attorney General.[49] And the 84th Congress has be-

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34. Besterman, *Commentary on the Immigration and Nationality Act*, 8 U.S.C. (1953 ed.) 1, at 50; *The Immigration and Naturalization Systems of the U.S.*, *supra* n. 19, at 613-14.

35. *In the Matter of O—*, 3 I and N. Dec. 376 (1948). See also *Freidman* v. *Kellogg*, unreported (S. Ct., 1926, Law No. 70842, filed November 12, 1925) (mandamus for approval of preference quota visa application).

36. *Cf.* Jackson, dissenting, *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 551, 73 Sup. Ct. 423, 74 L. ed. 317 (1950).

37. Pres. Comm. Rep., *op. cit. supra* n. 19, at 147.

38. Acton, Historical Essays and Studies 504 (1907, ed. Figgis and Laurence).

39. Dissenting, *New York* v. *U.S.*, 342 U.S. 882, 884, 72 S. Ct. 152, 96 L. ed. 662 (1951).

40. *Cf.* testimony of Charles F. Boss, Jr., Executive Secretary, Board of World Peace of Methodist Church, *Pres. Comm. Hearings*, *op. cit. supra* n. 19, at 802, 804.

41. Stone, *supra* n. 1, at 62.

42. Report of Department of State Concerning Visa Officers, *Pres. Comm. Hearings*, *op. cit. supra*. n. 19, at 1864, 1865.

43. "It is merely guesswork on the part of untrained officials abroad to attempt to pass on that", *Hearings*, *op. cit. supra* n. 10, at page 3.

44. Special Study by State Department Concerning Grounds for Refusal of Immigration Visas, *Pres. Comm. Hearings*, *op. cit. supra* n. 19, at 1874-1881.

45. *Supra* n. 42.

46. *Morgan* v. *U.S.*, 304 U.S. 1, 15, 58 Sup. Ct. 773, 82 L. ed. 1129-1130-31 (1938) (Italics supplied).

47. 2 Atlay, Victorian Chancellors 460 (1908).

48. Pres. Comm. Rep., *op. cit. supra* n. 19, at 147.

49. H. R. Rep. No. 1193, 72nd Cong., 1st Sess. (May 3, 1932) on H. R. 11552; S. Rep. 504, 72d Cong., 1st Sess. (April 4, 1932) on S. 34.

A Further Look:

Lawyers and Accountants

by Erwin N. Griswold • *Dean of the Harvard Law School*

■ **Addressing a luncheon meeting of the Section of Taxation during the Philadelphia Annual Meeting last August, Dean Griswold raised several points in the controversy between lawyers and accountants over tax practice which merit the careful consideration of both groups. Too much can be made of the differences between the two professions, he says, and most lawyers and most accountants are functioning much as they always have, quite undisturbed by the fuss. In his view the real difficulty centers not about accountants who practice accounting or lawyers practicing law, but about a hybrid profession of lawyer-accountants or accountant-lawyers that seek to practice both professions at the same time.**

■ For some months there has been a more or less open controversy between organized accountants and organized lawyers. I think we can all agree that this controversy has been unfortunate. As a matter of fact, I think that its importance has been considerably exaggerated. Individual accountants and lawyers are going ahead doing their jobs as they have been for many years in the past, working together, harmoniously and effectively. The overwhelming number of accountants have not been affected in their activities. It would not be fair to call the dispute a tempest in a teapot. But it really is fair to say that it is not worth the paper and time and effort that have been spent on it. It is no doubt hard to do, but it would be a very fine thing, it seems to me, if the organized accountants could be more philosophical about it, could recognize that they have certain formal disadvantages in the area, and would accept the fact that their difficulties are probably going to be worsened the more that attention is called to them.

In 1951, a very excellent Statement of Principles was adopted by a Joint Conference of Lawyers and Accountants, and was approved by the American Institute of Accountants and the House of Delegates of the American Bar Association. Of course on such a difficult and nebulous matter, this Statement of Principles does not give all the answers. But it does outline the approach which should dispose of many of the questions. Beyond that, the continuation of joint meetings between the representatives of the two professions should make it possible to wrestle with and probably to resolve specific questions which may hereafter arise.

In connection with the current controversy, the President of the American Bar Association has appointed a Special Committee on Professional Relations. This Special Committee has had several meetings with representatives of the certified public accountants. So far agreement has not been reached, which seems most unfortunate. It may perhaps be said that the position of the certified public accountants does not appear to have improved any during the year. I think they are about where they were. But where they were was really pretty good for them, and it would be a very fine thing indeed, it seems to me, if they would come to realize and accept that fact. No doubt, as I have indicated, they will have to be somewhat philosophical about their position, but if they are willing to do that, I think that they will find that they are not in fact materially hampered in carrying on their activities about as they have been carrying them on for a good many years.

The Chairman of the Special Committee on Professional Relations is a former President of the American Bar Association, Mr. William J. Jameson. I do not see how the Association could have a better representative. He has been patient, fair, reasonable, pleasant, earnest, genial, firm, always willing to hear all sides, open-minded—in short everything that the chairman of such

a committee should be. Although there is close harmony among the members of the Committee, I do not think that it can be said that there is close agreement among them on every aspect of the problem. Mr. Jameson has been particularly good, I think, in finding a fair consensus of the Committee and in presenting that view to the representatives of the accountants.

Last January, I undertook to make a speech in this area because the problem has long interested me and it was suggested that I might be able to make some contribution to it. I hope I may have contributed to discussion, at least. It is quite clear, of course, that I did not achieve a solution of the problem. There is one thing, though, which I suggested in that speech, and which has seemed to be even clearer to me since that time. It may be well for me to undertake to make the point here, though it is very likely that many will not agree with me. The point is this: The problem is often put in terms of "practice of law". Only lawyers can "practice law", it is said, and if what an accountant is doing is "practice of law" then he is acting improperly.

I feel fairly sure myself that this is not a sound way to approach the problem. The trouble is that it really begs the question. If we start with that approach, then the conclusion is going to follow as surely as the night follows the day that much of what the accountants have long and customarily done is improper for them to do. The people who think in terms of "practicing law"—and this includes many of those who have been active on unauthorized practice committees—proceed from that major premise to a minor premise that if the problem involves a matter of law, such as the application of a statute or regulation or court decision, then it is "practice of law" and can only be done by a lawyer.

But this is surely too broad. Must all policemen be lawyers? They are surely involved in applying statutes, and regulations, and court decisions. Their actions are not merely ministerial by any means. Must all city clerks be lawyers? Must the doctors in health departments all be lawyers, too? Must all legislators be lawyers? Obviously, there are many things involving the law and its application which can and must be done by non-lawyers. The "practice of law" formula is not a safe and sound approach, it seems to me, if it is taken to include a rule that any matter involving application of statutes, regulations and court decisions can only be handled by a lawyer.

It would be my own view, for what it is worth, that this is the error into which the trial court has fallen, to some extent, in the well-known *Agran* case. The court has taken a too literal, or semantic, view of the concept of "practice of law", and has not recognized that there are many things that lawyers do do which are properly also done by others. The concept of "practice of law" cannot be as exclusive as it sounds when it is put in those terms. There is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized.

In this connection, it is well to remember that the overwhelming proportion of the government's employees actually administering the tax laws are not lawyers. Some people may deplore this. Nevertheless, I suggest that it would not be wise for lawyers to seek to obtain any change in this respect. At the present time, the Treasury Regulations go far to protect the position of lawyers in the tax field. The organized accountants have been seeking a change in these regulations, or to obtain from Congress a change in the statute law which would affect the position of lawyers. So far they have not been successful. For a century and a half, the admission to the practice of law in this country has been in the control of the states, and that system has worked well. This deep-seated tradition is a powerful factor in favor of lawyers in the present situation. It seems to me likely, though, that Congress and the Treasury have *power* to prescribe the requirements of practice before the Treasury if they choose to exercise it. So far they have left this to the states, and I hope they will continue to do so. But the surest way to lead Congress or the Treasury to exercise its power in this field, it seems to me, would be for the organized Bar to take an extreme or unreasonable position on the matter.

The negotiations over the past year have been carried on with representatives of the American Institute of Accountants, which represents the certified public accountants. The certified public accountants are as a group the best qualified in the accounting field. But there are many public accountants and accountants and tax experts, and so on, who are not certified public accountants. For some reason, the certified public accountants have felt that they must seek to shelter all of these people under their wing. For example, the change in the Treasury Department Circular proposed by the American Institute of Accountants is applicable to all "agents"—which is the word used in the Treasury's Circular with respect to persons allowed to practice before it who are not lawyers. It might be that the lawyers would feel that some clarification should be adopted as to the position of certified public accountants, who have substantial standards and have obtained a measure of professional status—though they are by no means subject to the same sort of discipline as are members of the Bar. But it is very easy to see, I think, how no group of lawyers is going to agree to a change in the Regulations which is applicable to all "agents"—a term which includes persons of no qualification whatever. For example, a disbarred lawyer might immediately qualify as an agent. Anyone can set himself up as an agent, without any professional status whatever. To me it seems quite clear, regardless of the scope of activity which might well be allowed to certified public accountants, that lawyers must be vigilant in the public interest to see

that completely unqualified persons are not given what amounts to a federal license to carry on substantial legal activities in the federal tax area.

The problem is complicated by the fact that there are many public accountants who are well qualified and who have high standing. It is difficult to see, however, how this problem can be effectively handled except in terms of groups with prescribed qualifications. It may be that the whole accounting area is too much in a stage of growth and development, and that the certified public accountants would be well advised not to seek to clarify their position until they have been able to take over the whole field, imposing their standards on all persons who seek to practice accounting. If that should ever come about, then it might be possible to deal with the certified public accountants more realistically than at present.

There are a number of problems in the area to which little attention has been given and which I have by no means been able to think through. I am going to try to suggest or outline some of these problems, but with no thought that I am saying the last word about them, or even that what I have to say may be very sound. Some of the matters may be somewhat controversial, and I want to make it plain that I would surely welcome discussion and further consideration of them by any persons who are interested.

At the outset, I will mention a problem that has puzzled me considerably. The accountant has many functions. One of them is to set up systems of accounts. Another is to carry out audits. In the latter capacity, the accountant is usually referred to as the "independent accountant". He puts his certificate on the company's balance sheets, and published reports, and investors and bankers, and the S.E.C. and the stock exchange, and others, rely heavily on the accountant's independent judgment. In performing this function, the accountant acts in a very real sense judicially. He must decide questions, and he must be wholly free to decide questions against his client's interest if his investigation and judgment lead him to that conclusion.

My question is this, and it bothers me: Can this independent quasi-judicial function be properly performed by a person who also undertakes to act as advocate for the client? Suppose the accountant comes to the client and says: "I think I can get larger depreciation allowances for you." What then does he put into the company's published accounts to which he adds his signature? Does he put there what he thinks to be a sound depreciation allowance or what he thinks he can get the Treasury to allow? Many questions of this sort could be asked. The accountants have an important function in being independent examiners, and they have a long and honorable history in that work. Is this function really consistent with their acting as advocates for their clients before the Treasury? Perhaps they are able to rationalize this difficulty, but it seems to me that there is a problem here which requires some careful thinking.

Now let us look at some other problems.

There are a great many different sorts of activity in the tax field. There is first the making out of simple returns, including most of the returns for individuals. Accountants have long done much of this work. For the most part lawyers do not want to do it. It surely involves the application of statutes, and regulations and court decisions, yet I would suppose that nearly everyone would agree that it is appropriate for accountants to do this work. Then there is the matter of corporate returns. Here there is much that only the accountant can do if the return is of any complexity. Taking the figures from the books, prescribing and keeping inventories, and so on, are clearly work for the accountant. A substantial corporate return, however, will almost always have involved in it some novel or difficult questions of law. It is a fact, I believe, that many such tax returns are now made out by accountants. Sometimes this is done in co-operation with lawyers, or sometimes the return is reviewed by lawyers, but often there is no lawyer in the picture at all at this stage. Although there may be some question here in some cases, I believe it is, as a practical matter, pretty well accepted that accountants may make out such corporate tax returns without the intervention of a lawyer except as the accountant or the client thinks it desirable to bring a lawyer in.

Erwin N. Griswold
Dean of the Harvard Law School

Beyond this, though, the problem gets more difficult. The next stage involves representation of the client before the Treasury Department when some question is raised about the return. Of course the question may be one of accounting only, or one that is essentially accounting. It is widely known that much of this representation has been done by accountants for a great many years, with a lawyer called in only when the accountant or the client thinks that to be desirable. It would be my own view that this system has in fact worked well. The accountant has kept the books and prepared the return. On many questions, he is the person who can handle the matter most simply, and often most effectively. As has been pointed out,

the Treasury personnel who deal with these problems in the initial stages are not lawyers, and they often get their backs up if a lawyer comes into the picture. I have known of lawyers who, though giving advice, have had the corporation's treasurer carry on the negotiations with the revenue agent, because of a feeling on the lawyer's part that the treasurer can often get a better adjustment on routine matters, like repairs, and bad debt reserves, than the lawyer can.

At this point it is well to point out an important fact, which we lawyers should not forget in our consideration of this problem. That is the clear and undeniable fact that many lawyers are not qualified to practice tax law. Some of them know that, and some do not. But the mere fact that a man has been admitted to the Bar does not mean that he is competent to handle or to advise on a tax matter. This, I think, is one of the points that irritates the accountants most. We tend to say, sometimes, that only lawyers can practice law, and that this applies fully to tax law, making no distinctions among lawyers. Yet accountants know—and we lawyers know, too—that most accountants are much better qualified to handle the ordinary tax matter than are many lawyers. In many communities, the local lawyer habitually and willingly turns over all of the tax matters to the local accountant. Indeed the lawyer often has his own tax returns made out by the accountant. When a client comes in with a tax matter, many general practitioners simply throw up their hands and say, "Oh, you must take that to your accountant." The accountant is qualified to handle most of such tax questions which come to him. For the organized lawyers now to say that this is all improper, and that only a lawyer can handle what many lawyers are not competent to handle—matters which the accountant knows are habitually handled by the accountant with satisfaction to the client, and often to the local lawyer who has referred the matter to the accountant—this is understandably aggravating to the accountants. Moreover, it does not make sense as far as lawyers are concerned; and lawyers who are working on this problem must be careful not to overlook the fact, which I believe to be a fact, that many if not most accountants are better qualified to handle many tax questions than a very considerable proportion of the members of the Bar are. If this is actually the fact, lawyers must be extremely careful in this area, and must not officially take positions which are simply not realistic in terms of the work as it is actually being done in many communities.

There is another problem, however, which represents more serious difficulties. This is the matter of tax planning. This includes such things as corporate adjustments and reorganizations, family partnerships and trusts, and other aspects of estate planning, pension plans, deferred compensation plans, and so on. I suspect that a very large amount of this sort of work, including the drafting of often complicated instruments, has in fact been done over the past several years by accountants. I have grave doubts about the wisdom and propriety of this. It seems to me that the organized Bar might well look into this aspect of the matter, and that it might well be able to work out a better case here, leading to a possible agreement with the American Institute of Accountants, than it can in the matter of practice which is actually before the Treasury Department. My own observation leads me to think that many accountants have been very active in this area, and that they often do not use the restraint in advising clients which is customary among members of the Bar.

As an illustration, I recently heard that an accountant in my area was recommending to his clients, with respect to gifts to minors, that they should make the gift outright to the children's guardian, and then have the guardian create a trust with the funds extending beyond the children's minority. This was proposed as a means of obtaining the $3,000 or $6,000 exemption. Any lawyer would see, though, (1) that the guardian has no power to create such a trust, and (2) that the proposal comes pretty close, at least, to fraud on the Treasury.

I have no way of proving it, but I would venture the guess that three fourths of the family partnership agreements were suggested and drafted by accountants, and often they did not work out very well for the clients. I think it likely, too, that many corporate adjustments of one sort or another have been suggested and carried out by accountants, and that many pension and profit-sharing plans have been drafted by accountants. Perhaps the lawyers and the American Institute of Accountants should give further consideration to this aspect of the problem.

Now I want to turn to some other questions. It may well be, it has seemed to me, that the basic issue in this field is not between the lawyers and the accountants, but is between the lawyers and the smaller firms of accountants on the one hand, and the great national accounting firms on the other. Although lawyers in this country have long practiced in partnership, and some few of the partnerships are rather large, they are almost all local in their activities. There are a few law firms which maintain Washington offices, and there are a few law firms which have partners in two or three cities. But, by and large, a New York firm, no matter how large, does its work in New York, and a Chicago firm does its work in Chicago, or elsewhere in Illinois. It may have correspondents in other states, but it does not have a formal relationship with these correspondents. Law practice is overwhelmingly individual and personal. Many lawyers practice by themselves as individuals, or in small partnerships. The large partnership is definitely the exception.

(Continued on page 1179)

The Bar in Canada:

Its Organization and Problems

by D. Park Jamieson, M.B.E., Q.C., LL.D. · *Past President of The Canadian Bar Association*

■ **It has become a tradition to invite the President of The Canadian Bar Association to address a session of the Assembly during the Annual Meeting of the American Bar Association. Mr. Jamieson gave an interesting and informative explanation of the legal profession of our northern neighbor when he addressed the members at Philadelphia last August.**

■ One of the rewards of occupying the position of President of The Canadian Bar Association is the invitation to be one of the guests at your Annual Meeting. I need not tell you with what anticipation each succeeding President looks forward to his visit with you. Ever since the memorable joint meeting of our two Associations in Washington in 1950, I have looked forward to attending another Annual Meeting of your Association. The realization has been even greater than the anticipation. I will never forget the kindness and the generous hospitality which has been shown to me this week. I will cherish always the many new friends that I have made, and the pleasure of meeting again so many old friends, members of your Association, whom I have previously met here and in Canada.

With such pleasure there is the duty and privilege of saying a few words to you today. The subject of my remarks has caused me some concern, as, I have no doubt, has been the case of my predecessors in office.

We have heard your inspiring Annual Address, Mr. President, and were impressed by the memorable speech of the President of the United States and the eloquent reply of the Chief Justice of the United States yesterday. Tomorrow, at your annual dinner, we are to have the honor of hearing the Vice President of the United States. And today I am speaking at the same session as my good friend, the Right Honorable Sir Alfred Thompson Denning, a Lord Justice of Appeal of England, who is without peer as an authority and speaker on legal subjects.

If I have any merit for or right to the position I now occupy, it is not because I have been an outstanding counsel, but because I have been interested in our profession, not only as a practitioner but in its local, provincial and Dominion organizations since I started to practice in 1924. I have had the privilege of holding many offices in all such associations and of serving as a Bencher of the Law Society of Upper Canada during the last nine years.

Since 1924, I have attended the annual meetings of the Canadian Bar Association in all parts of Canada. Early in July this year, as President of our Association, I completed my visits to all provinces of Canada by attending their annual Law Society meetings. Last month, I attended the first Commonwealth and Empire Law Conference in London, England. From the opening ceremony in Westminster Hall where the delegates were welcomed by the Lord High Chancellor, Viscount Kilmuir, more familiarly known to us on this side of the water as our English guest of last year, Sir David Patrick Maxwell Fyfe, as he then was, to the closing banquet in Guildhall, where the Prime Minister, Sir Anthony Eden, spoke, it was a memorable occasion. Over one thousand delegates and their guests were present from all parts of the Commonwealth and much benefit was derived from the formal sessions and informal discussions of common problems between individual lawyers. Speaking personally, it gave me a new perspective and a new approach to many matters of immediate concern to the profession in Canada.

The relationship which exists between our two countries, Canada

and the United States, is unique in the world today. Nowhere is there such a complete exchange of ideas and information in all fields of endeavor.

In the field of law, we, in Canada, have gained much from your jurisprudence and from the study of your law schools and methods of legal training. The inspiration and final impetus for the formation of our own Canadian Bar Association was the Annual Meeting of your Association which was held in Montreal in 1913. Since our Association was formed in 1914, we have been honored by the presence of representatives of the Bench and Bar from Great Britain, France and your country at our Annual Meetings. Increasing numbers of our members are attending your meetings and that admirable publication, the AMERICAN BAR ASSOCIATION JOURNAL, is widely read and quoted in Canada. We feel, however, that a greater knowledge of the organization and government of lawyers in the United States would be beneficial to us.

During the last few years, in discussions with lawyers from all parts of the United States, I have found a considerable interest in the organization and government of our profession in Canada. There is no doubt that some of the problems of the legal profession are common to both our countries.

So I felt today that I would speak to you on a subject on which I have some first-hand knowledge—the legal profession in Canada and some of its problems—and trust that my remarks will be of interest to you.

With a population of something over 15 million people, we have in Canada today approximately 12,000 lawyers. Since 1945, the population of Canada has increased by over 3½ million people, or by roughly the same number as were in the Province of Ontario at the start of the last war. The increase has not, of course, been uniform across Canada. But such increase immediately raises the question—are we providing sufficient qualified lawyers to adequately serve our expanding population? The answer in some parts of Canada, at least at the present, would appear to be no.

In considering the legal profession in Canada, we must always remember that it is divided into two branches—barristers and solicitors. While it is possible to be called as a barrister alone, or enrolled as a solicitor alone, generally, all members of the profession qualify as both barristers and solicitors. So, to all intents and purposes, while the separate designations are retained, there has been a fusion of the two branches of the legal profession in Canada. In England, Scotland and some other parts of the Commonwealth, the two branches are separate. In others, there has been a partial fusion.

It was natural, therefore, that this topic should be on the agenda for the Commonwealth Law Conference in London last month and resulted in some spirited discussion. In recent years, there has been a small but increasing number of lawyers who contend that only separation or defusion of the profession in Canada will solve the growing problem of scarcity of counsel, including trained trial lawyers, and further, aid in relieving congestion in our courts and insure continuation of a recognized, qualified Bar from which our judges can be appointed. I am aware that in the United States, also, there are proponents of the separation of the two branches of the profession. On the other hand, in England and Scotland, while it is said that there is no appreciable demand by either the public or the profession, consideration is now being given to fusion of the two branches of the profession as a solution for some of the problems with which they are faced.

My friend, Joseph Sedgwick, Q. C., of Toronto, in an excellent paper submitted at the Commonwealth Law Conference, summarized the present problem in Canada with these words:

> Over the years, many judges have complained to me of the quality of much of the advocacy they are compelled to listen to; many solicitors have told me of their dislike of court work and of their inability to avoid it because of pressure from clients. Students and juniors have talked of their desire to become advocates and their difficulty in knowing how to do so, and busy counsel have told me of the distractions of solicitors' work which at least occasionally they are compelled to undertake.

While I cannot agree, personally, that the solution is defusion, there is no doubt that the problems I have mentioned do exist and must be overcome. We in Canada are following with interest your experience and discussions on this important matter.

The Canadian Bar . . . *Organization and Government*

Let us now look for a few minutes at the organization of barristers and solicitors in Canada.

Subject to certain special conditions which exist in the Province of Quebec, where the French civil law is in force, there is a law or bar society in each of the ten provinces in Canada and membership in a provincial society is a condition of the right to practice in that province. As I have said, there are 12,000 lawyers in Canada, and membership in the provincial law societies varies from approximately forty-five in Prince Edward Island to over 4000 in Ontario. Each law society elects annually, or for a longer period of years, a council or a body which in some provinces is known as the Benchers, who, between elections, exercise all the powers of the Society. When elected, such Council or Benchers choose one of their number who is the presiding officer for the current year and is known either as the President or the Treasurer of the law society of his province. The designation of the presiding officer as "Treasurer" follows, of course, one of the traditions of the Inns of Court in England and has nothing to do with the financial duties usually attributed to a person so described.

The powers given to the Bar Council or Benchers are purely statu-

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tory and are governed by, and limited to, the provisions in the particular provincial statute. There has been a tendency on the part of the provincial legislatures of late to look with a jealous eye on the very wide powers of self-government given to the members of the legal profession. Changing conditions are necessitating applications to the legislatures for amendments to the existing statutes and, in some cases, some of the rights formerly enjoyed have been taken away or restricted. But, in the main, the determination of the right to practice in any province and the power of self-government resides in all the members of the profession in that province through their duly elected representatives.

Such powers include, in each province, the right to prescribe the required legal education and conditions for call to the Bar. There are now law schools in all provinces except Prince Edward Island and Newfoundland, students from those provinces largely attending Dalhousie Law School in Nova Scotia. With the exception of Ontario, the law schools are run by, or closely associated with, the various provincial universities and have on their faculties members of the practicing Bar. The law society usually joins with the university staff in arranging a course of study and fixing the prescribed examinations. In Ontario, the Osgoode Hall Law School is operated by the profession itself and attendance there is compulsory before call to the Bar.

Speaking generally, a graduate must be called to the Bar in the province in which he has taken his legal training as a basis and prerequisite for call to the Bar in another province in which he may wish to practice.

Practically all provinces in Canada now require a period of service under articles of clerkship as a student-at-law before call to the Bar. As a student-at-law, he is entered on the rolls of the society and is subject to its jurisdiction and powers.

As Ontario has the greatest number of lawyers, and as I am more familiar with the situation there, I propose to use it as a basis for the remarks I now desire to make about the position of the provincial law societies and their members in Canada. It must always be remembered that they are statutory bodies and have only such rights as are given to them by statute. As I stated, changing conditions have necessitated amendments from time to time. In a recent example in Ontario, it was considered necessary to obtain an amendment to the statute to authorize the establishment of an indemnity fund.

The Law Society of Upper Canada, Upper Canada being the name by which Ontario was known before there was any Dominion of Canada, the governing body of the profession in Ontario, was authorized by a statute passed in the Second Provincial Parliament of Upper Canada in 1797 which provided that it should be lawful "for the persons now admitted to practice in the law and practicing at the bar of any of His Majesty's Courts of this Province, to form themselves into a Society to be called the Law Society of Upper Canada". The Society was organized on the seventeenth day of July in that year. Ten practitioners attended the meeting, calling themselves and five others to the Bar and appointed six governors or Benchers, one of whom became the Treasurer. The first meeting place of the Bar in Ontario might be said to be particularly appropriate in that it was Wilson's Tavern. Whether this was to carry out the tradition of the Inns of Court in England, or because of the convenience of refreshers, is not known.

In 1822, by another statute, the Treasurer and Benchers were declared to be "one body corporate and politic in deed and in law by the name of the Law Society of Upper Canada", with perpetual succession and a common seal. While at first the Benchers were self-perpetuating, in 1871 an Ontario Statute provided for the election by the members of the Bar of thirty Benchers in every fifth year. In other provinces, the election is held every year or at intervals of two or more years.

The Ontario Law Society Act provides that the judges of the Supreme Court of Ontario shall be visitors of the Society. As far as I am aware, this consists of dining with the Benchers when invited to do so. In other provinces, certain of the judges of the Supreme Court are Benchers of the Society and take an active part in its work.

In addition to the Law Society Act, there are two complementary statutes—the Barristers Act and the

Solicitors Act. The Barristers Act provides that: "The Benchers of the Law Society may make such rules, regulations or by-laws as shall to them seem necessary and proper, touching the Call or Admission of any persons, being British subjects, to practice at the Bar in His Majesty's Courts of Ontario, and such persons and no others shall be entitled to practice within the said courts." The Solicitors Act provides that: "The Benchers of the Society may make such rules, regulations or by-laws as shall to them seem necessary and proper touching the admission of any persons, being British subjects, who may be admitted and enrolled as solicitors, and such persons and no others shall be entitled to practice as solicitors in Ontario." The powers of the court over solicitors are preserved in two sections of the Act which provide that every solicitor shall be an officer of the Supreme Court and that nothing in the act shall interfere with the jurisdiction over solicitors as officers of the court.

By such statutes, no person has the right to practice in Ontario (and similarly in other provinces) unless he is a member of the Law Society and has been called to the Bar or enrolled as a solicitor in that province.

By such statutes, the Benchers of the Law Society (and similarly the Bar Council in other provinces) are vested with all the powers granted to the Law Society. The result is, of course, that in each province the profession is self-governing.

The Benchers have power to admit, to discipline, to suspend or to disbar from practice. They have power to prescribe the fees which must be paid for the required annual practicing certificate and the fees payable for call to the bar and enrollment as a solicitor. They have power to hold land and to invest and expend the funds of the Society.

The Law Society Act specifically provides that the Benchers may make rules for the government of the Society and other related purposes. In pursuance of the Act, the Benchers have passed rules exercising the powers given to them and have established standing committees to whom much of the work of the Benchers is, in the first instance, delegated. Such committees include those on finance, library, reporting, legal education, discipline, unauthorized practice, county libraries, public relations and legal aid. Their titles will give you some idea of the range of the work undertaken.

While, in Ontario, there is no statutory right of appeal from the exercise of the right to disbar, in some provinces such a right exists. Even in Ontario, the right to disbar can only be exercised after due inquiry by a committee of the Benchers and a finding of guilt by the Benchers. Some persons disbarred have appealed to the courts to quash the proceedings and to set aside such disbarment upon the ground that the powers given were not duly exercised. In a recent case, the Supreme Court of Canada found that there had not been due inquiry and quashed the proceedings and restored the applicant to the rolls of the Society. This is not as serious as it may sound, as this is the only case I know of where the proceedings have been so quashed.

Difficulties have arisen in other individual cases. In one province, on the refusal of the Benchers to call to the Bar a person whom they considered unqualified, a statute was passed giving such person the right to practice in that province. In another, the Benchers were the subject of attack for refusing to call to the Bar an admitted Communist but their action was fortunately upheld by the courts.

On the whole, the law societies have the confidence of the government and the respect of the public. Many of their actions have done much to better the public relations of the profession. To mention briefly a few of them: The requirement of separate trust accounts for clients' funds and the provision for auditing such accounts when required—the immediate and strict enforcement of disciplinary proceedings where warranted—the provision in most provinces of indemnity funds contributed to, and maintained by, the lawyers in that province to cover defalcations by solicitors—the provision for legal aid now operated and paid for by the law societies in many of the provinces of Canada—the maintenance and increase in the high standards required for admission to the Bar.

In addition to the provincial law societies, there are in each province district or county law associations, voluntary in their nature, which are composed of members of the profession in that area and are assisted financially by the provincial law society. In most cases they are responsible for and do maintain the county or district law library and prescribe a local tariff of fees for services not covered by the Rules of Court.

As you will have realized from my remarks, the members of the profession in each province of Canada might be said to be in a water-tight compartment and, to a large extent, this is true. A member of the Bar in Ontario cannot appear before the courts or practice in another province without first being called to the Bar or enrolled as a solicitor in that province. Recently an attempt was made to provide for uniform standards of admission for lawyers who wish to transfer from one province to another, and certain rules were approved. Under these rules, a member of the Bar in one province may be called to the Bar in another province provided that he complies with the specified requirements as to admission, service under articles of clerkship, or practice in his home province and after passing examinations on the Rules of Court and Statutes of the admitting province and serving under articles any additional time which may be required. This, in some cases, may be as much as a year and a half. These provisions do much to take care of the direct and permanent transfer of lawyers from one province to another. They do not provide for the case of a client with interests extending into many provinces who desires

(Continued on page 1173)

On Learning To Write:

Suggestions for Study and Practice

by Harold G. Pickering · *Professor at Hastings College of Law*

▪ One learns to write, George Bernard Shaw once said, by making a fool of himself until he learns how. Professor Pickering declares that too many lawyers do not know how to write—perhaps being fearful of making fools of themselves. At any rate, the number of courses in our law schools devoted to "legal writing" is growing. Professor Pickering points out that even the most competent instruction is limited by the capacity of the student to write at all. His article offers some suggestions on improving one's own ability to write, and it recommends some books that are models of good English style.

▪ A prevalent lack of proficiency in the art of writing throughout the profession is attested by the frequency with which judges, law professors and mere lawyers write about it.

For the most part these writings have been concerned with legal writing, and for obvious reasons.

A recent survey by a committee of law professors disclosed the fact that a number of law schools have introduced courses in legal writing. A review of the survey discloses that these courses—many of them "noncredit courses"—are usually integrated with courses in legal bibliography, the moot court program and other established courses. Sometimes they include lectures on legal research and analysis, on the common law, on brief writing or on the detemination of the *ratio decidendi* of a case and the submission of problems in these fields.

Certainly there is no room for criticism of either approach. Both the writings and the law school courses are of inestimable value.

Nor is there room for the assumption that the competent authors and teachers involved are under any illusion that their readers or students know how to write and are deficient only in the skill of legal writing.

The fact remains, however, that the affirmative results of the most competent exposition and of the most competent instruction must perforce be limited by the degree of the capacity or of the incapacity of the reader or student to write at all.

Neither approach reaches the root of the problem.

With these premises in mind, a lecture of the following tenure was delivered to the senior class of The Hastings College of Law of the University of California. The class was a class in trial practice. As an adjunct to the course the students were actively engaged in preparing, briefing and arguing motions and in trying cases in a practice court at the trial level. It was not the objective of the lecture to outline a program for the colleges of liberal arts, or for the law schools.* The object was merely to indicate to the students how they might offset the deficiencies in their scholastic training by self-education.

This is not a lecture on brief writing. Before you can write a brief you must know how to write. The technique of brief writing is a step beyond the fundamental art of writing, an art in itself.

Proficient Public Speaking . . . *But Writing Is More Important*

For the lawyer, proficiency in the art of writing is much more important than proficiency in the art of public speaking. Unless you have thought about it you may wonder why.

Proficiency as a speaker is, of course, more important to the trial lawyer than it is to other members of the profession. However, whether you are appraising the work of the trial lawyer or that of the office lawyer you will be faced with an inescapable fact. That fact is, that meas-

*After reading a copy of the lecture, Mr. Justice Dore, formerly of the Appellate Division of the Supreme Court of New York, First Department, wrote: "Get your college to install an obligatory course for *every* student and make a passing mark in that necessary for a degree, as vital as any course in law, and lasting all 3 years."

ured in terms of bulk or quantity, and for this purpose that is a sound and scientific standard of measurement, by far the greatest proportion of the lawyer's product, the commodity in which he deals, the thing which he sells, if you please, is the written word.

A somewhat extended recital of specific products may be necessary adequately to demonstrate the verity of this statement. There are, of course: wills, trust agreements, contracts, corporate charters, by-laws, corporate minutes, corporate mortgages—or indentures—title certificates, legal opinions, registration statements, prospectuses, annual reports, letters to stockholders, proxies, proxy statements, letters, petitions, claims for tax refunds, bankruptcy claims, claims in probate, pleadings, notices, motions, briefs, orders, findings of fact, judgments.

The drafting of every one of these writings calls for the highest degree of writing skill to which any lawyer can attain.

To that end the lawyer should have a good vocabulary, not necessarily a large vocabulary, but a discriminating knowledge of the utility and value of a sufficient number of words—preferably simple words—which will enable him to use the right word in the right place and the most effective word for the place.

He should know how to put words together in simple, concise and grammatical sentences and orderly paragraphs, with a sufficient knowledge of the integrity of each to enable him to depart from the rules now and then for the sake of effect, without doing violence to the rules.

He should have an infinite capacity for clarity, the ability to make the theme of the writing crystal clear.

The editor of Macaulay's *Life of Johnson*, commenting on the "absolute clearness" of Macaulay's writing said: ". . . this . . . was a quality that he sought continually, sparing himself neither work nor pains". There is no gainsaying that in the world of letters there are innumerable men of genius whose skill born of talent, you cannot hope to equal, much less to excel. But you can learn to write; and it is encouraging to note that even the masters of English prose were aware that their native talents needed to be augmented by study and practice. Unlike the skills of the heroine of *Annie Get Your Gun* which were attained by "doing what comes natcherly", the stature of the great writers was the end result of hard labor, unstinted self-criticism, unremitting self-discipline and endless revision.

Searching Out the Facts . . . *The Children of Imagination*

Of course you can't think of writing without calling into play your talent for imagination. How are you to discover and choose the facts which you will want to array? Inquiry of obvious sources of information will be superficial. Facts are more elusive than that. They are not so easily unearthed and brought to light. You will need to imagine what facts must or might have been antecedent to the thing you want to discuss, to explain or to establish, or you will not have the vaguest idea of what facts to look for. Only when you have done this can you make an intelligent search for the facts. Facts are the children of imagination out of investigation. Then too, you must have a mental concept of the whole of your theme before you start to arrange it. You must see it in substance before you write it. To conceive of the substance of a thing before it materializes is to imagine it. You must imagine how the whole thing is going to stack up. You must have a mental concept of every detail of your theme before you start to express it. How are you going to pick and choose your adjectives, your adverbs, your similes and your metaphors unless you first have a mental image of the picture you wish to depict? You must have the feeling of what you want to say while feeling for the words with which to say it.

You will need also to think of the development of your theme in the terms of logic. A popular public speaker once pointed out that of all the factors making for the successful public presentation of a subject, oral or written, the most important is logic. His thesis was that, however low the intelligence quotient of the audience, the fact remained that the human mind responds more readily to logic than to illogic.

Another indispensable talent is narrative power; the ability to bind your sentences and your paragraphs with a continuous thread of thought which extends all the way to the point of your theme.

And finally there is required the ability to build the narrative up to a climax.

Perhaps you are thinking something like this:

"The man is, or should be, speaking of legal writing. A discriminating choice of words, sound sentence structure, logic and clarity—I can understand their relevance. But whoever heard or dreamt of the stylistic qualities of imagination, narrative and climax in connection with the drafting of a will, the spelling out of the preferences of the first and second preferred stock on the back of a stock certificate, or the drafting of a contract for the sale of real estate?"

If that is what you are thinking, it is because you do not appreciate the influence of these qualities upon your writing.

In connection with legal writing I am not thinking of imagination in the sense of fiction, or of narrative in the sense of that gripping prose which would be characteristic of a story of stark adventure; nor am I thinking of climax in terms of that ecstatic moment when the tangled threads of the drama are at last untangled in a thrilling denouement.

But in the most drab of legal documents which you may be called upon to write you have an objective to be reached, you have a point to make. You have to accomplish it with words, phrases, sentences and paragraphs. In doing it, if you are

doing a good job you are utilizing, albeit subconsciously, these qualities of imagination, narrative and climax. You play upon them in subdued tones, or paint them in lackluster colors, but they still are there, giving quality to your writing. And the intelligibility of your writing will be in direct proportion to the presence or absence of these qualities in your style.

A lawyer's style of writing should be pliable, flexible.

If you will review the list of things a lawyer is called upon to write you will be aware of the fact that each of them will require a different treatment. Drafting a will differs measurably from the writing of a brief in which the qualities of narrative and climax really come to the forefront in their true colors.

So, like a baseball pitcher, you must have a change of pace if you are going to achieve a shut-out. You will need to adapt your style to the job in hand. If you are going to do that you have got to know something about pitching—something about style.

All of which is by way of saying: If it is important that others should know what you want them to know, then you will need to know

HOW TO WRITE.

You may think you know something about writing. But few of you do know anything about it. Assuming that you do know something about it, the bald truth is that you do not know enough. If you have had no instruction in the subject you may be self-critical enough to realize your incapacity. In either case the question arises as to what you can do about it.

To Develop Style . . . *Study and Practice*

There is a great deal that you can and should do about it. Teach yourself. Resort to practice and study; study and practice. Even the indolent Samuel Johnson was wont to read a classic essay or treatise, put it aside, write one of his own on the same subject, and then to compare the two for his own instruction. Surely such an exercise cannot be beneath you.

Whenever you have anything to write, think as much about the writing of it as you do of what you are writing about. Think of your reader. Is he familiar with the subject or ignorant of it? Envision his background, experience and environment. Ask you, yourself, whether he is likely to be prejudiced or open-minded. Imagine yourself as the reader. Ask yourself how you would like the subject presented; to what sort of presentation would you be the most hospitable mentally? Fix in your own mind whether the writing is to be informative, declaratory, expository, emotionally persuasive or argumentative.

With these considerations behind you cut your pattern to fit the cloth.

But you are not yet ready to write. You merely are ready to read. Take from the shelf a book or two by one whose writing is exemplary of the style which you think is the appropriate medium for your pattern, and read and read and read until you feel yourself in the mood of the style. Then you will be ready to write. "It was not for nothing," wrote Lytton Strachey in discussing Gibbon's style, "It was not for nothing that he read through every year the 'Provincial Letters' of Pascal."

As you write make a study of the important words you propose to use. Look them up in the dictionary, trace them through the thesaurus and see if there may be a synonym that is more suitable, more expressive or more forceful. Use the best word you can find.

For this procedure you will need tools. You should have those tools in your law library. In assembling your law library these tools, which of course are books, are the first ones to acquire.

The first book you should acquire is a good dictionary.

Next in order is Roget's *Thesaurus,* or Hartrampf's *Vocabularies.*

After these you should have a few good books by masters of style, snatches of which you should read every day, and which you should read more assiduously from time to time as circumstances permit.

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In this category there is a wide choice, depending on individual tastes and preferences. Of course the Bible and Shakespeare are standard. In the careers of many famous writers and speakers they are reputed to have been basic. I would include them. The choice is wide. However, I can suggest a few books which are worthwhile to have around, and the reading of which will pay dividends if you are disposed to cultivate style. And I mean books for your law library.

An excellent book in which to browse, one which begins to veer away from the lyric toward the ingenuous, is Walton's *Compleat Angler.*

For outright utilitarian prose I would recommend Macaulay's *Life of Johnson.*

For exquisite narrative I recommend that you include Miles's translation of André Maurois's *Disraeli.*

For a thorough-going lesson in the cogency of brevity, by all means have at hand a copy of Strachey's

Portraits in Miniature.

At the risk of being charged with contributing to your delinquency I would say that it would be worth your while to peruse the pages of the most recently discovered papers of James Boswell.

For an informative example of thought-provoking paragraphs and pregnant clichés, a frequent reading of Claude Houghton's *I Am Jonathan Scrivner* will be a source of inspiration.

As a brilliant study in the art of bringing into focus the seemingly irrelevant facts of life to illuminate the theme with the klieg lights of clarity read now and then Mankiewicz's *See How They Run.*

For beautiful diction and expository excellence turn frequently to a reading of Rachel Carson's *The Sea Around Us.*

You are minded, perhaps, to have a few law books about. Well and good!

You will need first of all your state statutes and codes, a good book of forms, your state digest, and if you can afford it, your state reports. But a law library of several thousand volumes will be ever inadequate for research and the county libraries, the court libraries and the bar association libraries are always available. You cannot duplicate them.

What you need at hand are the means of learning how to get your learning across the plate, where the umpire is calling strikes and balls.

And with that in view, be sure to include in your law library for instruction in the dramatic portrayal of incidents and spectacular characterization in the vivid eloquence of sheer simplicity a copy of *Alice's Adventures in Wonderland.*

Lawyers and Adoption:

The Lawyer's Responsibility in Perspective

by Alex Elson (of the Illinois Bar) and Miriam Elson

■ **The authors' thesis is that lawyers, as a profession, do not have the kind of training and experience that is necessary to handle the complex problems of placing children for adoption. His role in the process of entrusting a young baby to a couple to be reared to adulthood must be the giving of legal advice, not the counselling which social workers have been trained to provide. With 90,000 children available for adoption and 900,000 childless couples seeking babies to adopt each year, the lawyer, as a trusted family counselor, is bound to be approached for help. The authors, one an attorney and the other a social worker, set forth considerations that the lawyer should have in mind when he talks to his clients.**

■ Recent publicity about black market traffic in babies gives prominent place to unscrupulous lawyers out for a high fee. These lawyers conduct a cash and carry practice in the placement of babies and are oblivious to the tragic consequences of their work. In the public mind, they bring disrepute to the lawyer's role in adoption. They obscure the very positive force lawyers and judges, individually and through local bar associations, exert in improving state adoption laws and in strengthening the work of social agencies in their communities. Apart from the lawyer who participates in the black market, there is a far larger group of lawyers who, with the best of motives, participate in independent placement of children. It is important, therefore, not only to understand the responsibility of the legal profession and its area of competence in adoption, but to understand also the role of the social agency in the adoption process.

Adoption is a creation of the legal process. It involves unequivocal and irrevocable adjustment of legal relations with profound and permanent implications for natural parents, adopting parents, child and society. In this age of increased understanding of human development, of interdisciplinary approach in identifying and eliminating the sources of human unhappiness and ill health, the responsibility of the lawyer in the adoption process must be viewed in perspective.

In pragmatic terms, what are the responsibilities of the lawyer in relation to the several categories of adoption matters that come to him? Most commonly he is consulted by clients who desire to adopt a child. The lawyer describes the legal consequences of adoption, irrevocable in all but a few jurisdictions: that the child becomes the child of his clients as if born to them naturally, that the obligation to nurture and support the child, and the child's right to inherit, follow from this. He explains that all rights of the natural parents are completely severed, describes the inheritance rights of the adopted child, and details the requirements of the relevant adoption statute.

Although adoption statutes vary greatly, all require some form of consent from the natural parents, or a court determination that they are unfit with consent to adoption vested in a guardian ad litem or other appointed agency. The lawyer describes the requirements of venue, service of process and similar jurisdictional problems, the need for complying with waiting periods, and that a showing must be made that adoption by his clients is for the best interests of the child. Most important, he stresses the serious social and relational problems involved and makes clear that a lawyer is not the person who can best advise in this area. He may at this point refer his clients to recognized child placement agencies in his community.

This is the focal point of the interview and if the lawyer fails here, he does a great disservice to his clients, a disservice which may have damaging consequences to them and to others.

The fact is that most lawyers recognize they do not have the requisite training and experience to deal with what has become recognized as a special area of social service. This is accepted by a substantial part of the legal profession, but in actual practice there are many lawyers who have not availed themselves of the child placing resources in their communities. It is important to try to understand this.

An attorney serves as family counselor and is jealous of his role. His advice is sought on a great variety of relational problems including those of the most intimate nature. The privileged character of the relationship encourages full disclosure by the client. The fact that the lawyer will respect his confidence, and that this privileged relationship is protected by law, gives the client a release which is valuable to him even though the lawyer plays the completely passive role of listener. The client goes to his lawyer with marital problems, with difficulties with his children, especially when they become involved with the law, with requests for drawing up his will and planning his estate. On a wide range of subjects, he brings to bear knowledge and experience of many years. It is not easy for him to defer to another profession in the matter of adoption.

When an attorney attempts to give advice other than legal to adoptive families, his motivations are in accord with professional standards. But the best motivations are not a substitute for specialized knowledge and training in the field of child welfare. Lawyers who best serve their profession and their clients recognize this fact. One can say that with few exceptions, attorneys who appreciate and recognize the special skills available in a child placing agency are those who have had the experience of handling the legal aspects of an adoption processed by an agency.

The Key Problem . . . *Difficulty in Getting a Child*

The key problem is focussed in the interview at the point that clients tell their lawyer that they understand it is difficult to secure a child. They have heard of the "red tape" involved in adoption agencies, that agencies are "choosy". In some cases, clients have already canvassed available agencies and have been either discouraged or rejected. This is a difficult problem, but the hard fact is that yearly 900,000 childless families seek to adopt an estimated 90,000 children available for adoption. Approximately 45 per cent of non-related adoptive families are brought together by social agencies. An additional 20,000 to 40,000 might be available if legal barriers could be cleared away or, in many instances, if families could be found willing to undertake the care of handicapped children.

Much has been written about the kinds of families agencies look for, their need for stability, for working out a satisfactory religious adjustment, for being "well-adjusted" generally. All of this is important information, but the effect of it has been to penalize unduly families who are unsuccessful in securing a child. It would be untrue to say that an important weeding out process does not go on. People are refused service by adoption agencies for good reasons, and though sometimes it is a painful experience, a greater kindness has been done to the family than they can realize at the time. However, if one-half the indignation heaped on agencies for their "red tape" were channelled into constructive citizen participation, existing agency services could be extended to cover more children, and in this way to help more families.

A lawyer who has observed some of the disastrous consequences of misguided adoptions, or attempts at adoption, knows the hazards involved. A substantial part of the legal profession is not generally aware of the nature and character of the social work profession, that it has developed special skills based on a body of knowledge developed over many years. This is true not only in relation to adoptions but to many other fields of social service.

A trained social worker has completed four years of college work and at least two years toward a master's degree which includes a year of supervised work, equivalent to an interneship, in the field of her choice. For an adoption worker, usually an additional period of service in the field of child welfare is required. Not only trained social workers, but pediatrician, nursing staff, consultant psychiatrist, psychologist, lawyer and other specialists, called in as they are needed, are included on the staff of the larger agencies.

The social work profession recognizes the special skill of the lawyer in the field of law. Practically all social agencies retain special counsel or include lawyers as members of their boards of directors. A social worker does not presume to give legal advice to clients, and a lawyer, though often rich in knowledge of human relations, is not trained to understand the special needs of children in search of permanent homes, of the natural parents, usually the unmarried mother who must give up forever all rights to her child, and of the adopting parents whose hopes for a happy family relationship rest on recognition of the motives which impel them to seek adoption, their rightness for the child entrusted to them.

Social agencies themselves have been highly critical of the slowness in processing adoption applications. The better agencies have pioneered in servicing adoption requests promptly. They have stripped their adoption service of all detail which diverts them from the main job of finding each child a permanent home by the time he is twelve weeks or younger, depending on his condition. They believe that couples are entitled to know rapidly whether their home can be used for a child, and they are entitled to be free of the stigma of being "rejected applicants". By knowing their children well and interviewing only a small number of families appropriate to these children each month, the need for cumbersome waiting lists is dis-

pensed with. For the purposes of this discussion, it may be well to review the way in which adoption is handled in a recognized agency of good standards.

Yearly, thousands of children in any state of large population lose their homes because of death, illness, desertion, abuse or neglect. Most of these children have legal ties and are referred to child-placing agencies for foster care only. They are placed in carefully selected foster homes under the supervision of trained social workers. For some of these children, emotionally disturbed, treatment homes must be found where, hopefully, their problems can be treated early enough to permit them to grow into healthy adults. Some children, a very much smaller number, are referred by hospitals, other social agencies, the courts, parents or other interested individuals for adoption.

Who are these children? For the most part they are newborn, the children of unmarried parents. Ideally they would be placed in adoptive homes when released from the hospital. In practice, however, it is to the best interests of child and family to provide a period of observation. Some infants with full family history, whose mothers have gone through a normal pregnancy and delivery and whose condition at birth is good, can be placed very early. In other cases the period of longer observation under the care of a warm foster family, with continued supervision by a caseworker, periodic examination by pediatrician, psychologist, and other specialists as indicated, permit the agency to make some predictions as to the child's emerging personality and needs. Thus, knowing the babies who will be ready for adoption in a given month, the agency can interview only a few couples who seem to be natural parents for these children.

It is difficult to provide an orderly selection of appropriate families for the thousands of childless couples who yearly apply to even the smallest child-placing agency. Restrictions as to age or religion are the policy agreed upon by many forces in the community.

Alex Elson practices law in Chicago. He has been a member of the American Bar Association since 1935 and is a member of the Illinois State and Chicago Bar Associations, serving as a member of the Board of Managers of the Chicago Bar Association, 1944-1946. He has been active in numerous volunteer capacities for agencies in the social welfare field. He was an Illinois delegate to the Midcentury White House Conference on Children and Youth.

Miriam Elson (Mrs. Alex Elson) was educated at Northwestern University and taught high school English, dramatics and journalism in Indiana. Through her husband's volunteer activities, she became interested in psychiatric social work and received an M.A. degree at the University of Chicago, School of Social Service Administration. Until June, 1953, she was Assistant Supervisor of the Adoption Division of the Illinois Children's Home and Aid Society.

At what age is a couple old enough to rear a child to maturity, at what age too old? We can only say that according to the census of 1950, mothers having their first child are between 20 and 24 years of age. Ten years ago, couples applying to agencies were much older, almost within the closing phase of child-bearing age, but with new understanding in the field of fertility, childless couples are applying much earlier in their marriages. The laws of biology were not developed by social workers. In placing children, social workers must give consideration not only to the present, but to the child's long maturing process. The capacity to respond with zest to the demanding years of boundless energy with which healthy children are endowed is not characteristic of the older age group. There are individual differences based on physical constitution, and rigid rules as to age can lead to injustice, but, in general, the best interests of the child require placement in younger families, families who are, however, considerably above the 20 to 24 year age bracket.

Many states have written into the adoption statute a requirement that children be placed within the broad religious classification into which they are born. The constitutionality of this requirement was recently upheld by the Supreme Judicial Court of Massachusetts (*Petitions of Goldman*, 331 Mass. 647, 121 N.E. 2d 843, Sup. Jud. Ct. of Mass. September 27, 1954, certiorari denied by the Supreme Court, 348 U.S. 942 (1955). Complying with this requirement, sectarian agencies place children with families who represent their denomination. Non-sectarian agencies must find families whose

general characteristics, including religion, harmonize with those of the children currently under their care.

Generous Wishes . . . *But Adoption May Be a Mistake*

These are only some of the considerations in the preliminary selection of adoptive applicants. Couples who offer their home to a child do so out of generous wish to share their lives with a youngster. Yet their inner feelings and wishes may make adoption an unsatisfactory experience for them and their child. Families that cannot be helped are told briefly and courteously how the program works, why statistically, so few families can be helped. Families have been willing to let an agency know them well, even though in the end they may not secure a child, if a decision can be reached early.

To arrive at this decision, interviews with the adoptive applicants are conducted, not as a direct or cross-examination by the caseworker, but rather as friendly conversations in which families are encouraged to examine their own feelings about parenthood by adoption, to think through what their expectations for a child may be. This is done with understanding and compassion and, together, a decision is reached to move ahead with adoption or to withdraw.

In general, the couple selected will be one comfortable with each other, recognizing and accepting each other's faults, knowing and complementing each other's strengths. They are reasonably content with themselves and their way of life. Most important, they have faced their disappointment in not having a family naturally and can accept an adopted child for himself alone, for his own special characteristics, for the joys and problems any child presents.

It is right that would-be parents describe the kind of child they would like to have. It is vital that they recognize with clarity their inner feelings about this. But it is wrong to keep an adoptable child waiting for a home while the agency looks for a child that will fit the specifications of a particular family, however worthy. Some families approach agencies with such a list of specifications as to the kind of a child they will accept that it is impossible to help. Children are not custom-made, and this attitude often suggests parents who are so controlling that children would have an unhappy time growing up with them. Fortunately, most would-be parents are eager to share their love and shelter without unreal demands about the kind of child they want.

Just as important as knowing and understanding the children they place is sympathetic understanding of the families they seek to help. When an agency has learned to know husband and wife reasonably well, has established the fact that they are physically healthy, and financially able to care for a child (standards here are modest), the prospective parents are told about the child who seems to share basic similarities with them. They are helped to understand his history, and this is done in ways which in later years will prove helpful to the child in achieving a sense of his own dignity and worth.

In short, agencies are not seeking certified babies for certified families. They are seeking to understand in the shortest time consistent with the future well-being of the adopted family they are bringing together the special needs of the child, the special qualities of the family to whom society, through the auspices of a social agency, is entrusting a young baby to be reared to mature, effective adult life. Following placement, all casework efforts are directed toward helping families grow comfortably together, continuing contact with the family usually for a year following placement. At this time legal adoption is recommended with the family going to their own attorney, but the agency stands ready at all times, even following adoption consummation, to be of assistance to the adoptive family if this is requested.

Thus the role of the lawyer in an adoption which originates in a child placement agency is considerably eased. Assuming a properly handled case, the usual anxieties which surround an adoption are resolved; the agency has employed tested techniques to bring together a sound family unit. The attorney has the important job of making certain that all of the legal requirements of the adoption statute have been met and that the decree will be unassailable. The social agencies rely completely on the practitioner for guidance in all legal aspects of adoption.

When clients appeal to their lawyer for assistance in securing a child, the lawyer can play a constructive role in indicating the legal limitations which apply under laws requiring licensing of child placement agencies and which forbid lawyers or others from engaging in placement. He can explain the reasons for such laws. He can outline the hazards to the client, to the child and to the community. He can point out that in the absence of skilled case-work with the mother and careful investigation, there have been numbers of tragic cases of adoptive parents who have had their child taken from them, long after placement, when a mother has changed her mind; adopted children who develop serious physical or mental defects; adopted children whose mixed racial background does not become apparent until it is too late to make a wise choice of family on the basis of the child's characteristics; and adopted children of low intelligence placed with adoptive parents having ambitions for the child which cannot be fulfilled. It is clear that he would violate his professional responsibility if he ventured to secure a child or suggest the means of securing a child outside recognized agencies, if indeed he knows of any sources.

We realize that there will be disagreement by some attorneys who are not engaged in black market operations. They can point out that more than half the children adopted by non-related persons are placed

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Social Security for Lawyers:

The Profession Should Not Be Excluded

by Henry A. Malkasian · *of the Massachusetts Bar (Boston)*

▪ The question of including members of the legal profession under the Social Security system has been the subject of great differences of opinion among lawyers. At the recent Annual Meeting in Philadelphia, the House of Delegates called upon the state and local bar associations to poll their membership on the question. Results of the polls will be evaluated by the Conference of Bar Presidents. Mr. Malkasian gives the reasoning of those who think that lawyers should come under the social security law.

▪ The recent amendments to Title II of the Social Security Act[1] conferred a distinction upon the professions of law, dentistry, medicine and related medical fields. Individual practitioners, including partners, in these fields now remain with very few exceptions the only self-employed persons to be excluded from the Old Age and Survivors Insurance (OASI) Provisions of the Social Security Act.[2] Indeed, with very few exceptions, every other breadwinner in our economy, whether he be an employee or self-employed, is by law includable in a government administered retirement system.[3]

With OASI embracing such an extensive group of jobs and job holders, it would seem that compelling reasons should exist to justify the exclusion of a few professions, including the legal profession which is necessarily our prime concern. However, when the reasons pro and con are weighed, the arguments advanced by the proponents of exclusion seem to be so far from compelling that they are not even convincing when compared to the reasons for inclusion. Nevertheless, due mostly to the general apathy of the legal profession as a whole, the spokesmen for exclusion were successful in having the Senate Finance Committee remove lawyer coverage from the bill as passed by the House.[4]

I am not sure whether I can accurately summarize arguments proffered by the proponents of the exclusion of lawyers when such arguments seem to be confused and often self-contradictory. The prime argument, however, seems to be that OASI is a charity proposition, involving a government hand-out and consequently that it would degrade the profession to participate. This argument betrays an ignorance of the intent and operation of OASI. A succinct explanation of the operation, intent, and place in our national life of OASI was provided by President Eisenhower, who stated:[5]

> Under Old Age and Survivors Insurance (OASI), the worker during his productive years and his employer both contribute to the system in proportion to the worker's earnings. A self-employed person also contributes a percentage of his earnings. In return, when these bread-winners retire after reaching the age of 65, or if they die, they or their families become entitled to income related in amount to their previous earnings. The system is not intended as a substitute for private savings, pension plans and insurance protection. It is, rather, intended as the foundation upon which these other forms of protection can be soundly built. Thus the individual's own work, his planning, and his thrift will bring him a higher standard of living upon his retirement, or his family a higher standard of living in the event of his death than would otherwise be the case. Hence the system both encourages thrift and self-reliance, and helps to prevent destitution in our national life.

The provision for OASI is found in Title II of the Social Security Act.[6] Under Section 201 thereof, a

1. P.L. 761 (H. R. 9366) 83d Cong., approved September 1, 1954.
2. Social Security Act (Act of August 14, 1935, 74th Cong. c. 531, 42 U.S.C. c. 7, as amended) as amended by §101g (4) of P.L. 761, 83d Congress.
3. Major groups excluded from OASI are members of the Armed Forces, most federal civilian employees and policemen and firemen covered by a state or local retirement system. Under OASI, certain groups such as employees of charitable and religious organizations, and municipal and state employees are includable on a voluntary approval basis.
4. Senate Committee Report on H. R. 9366, page 5.
5. Text of President's message to Congress on Social Security Amendments, January 14, 1954.
6. Footnote 2, *supra*.

trust fund is created of the amounts paid in by those covered and by their employers in the case of covered employees. It is 100 per cent contributory on the part of the participants and their employers, and to my knowledge the Government has not contributed one dollar to the fund. This is entirely different from State Old Age assistance which is given to aged needy individuals who meet certain requirements. Under OASI, need of an individual or the amount of his wealth or that of his estate are not determining factors in either his or his family's entitlement to benefits or the amount thereof. Nor are the monthly benefits a uniform amount for all recipients. Individual benefits range from a minimum of $30.00 a month to a maximum of $108.50.[7]

The argument that lawyer inclusion would degrade the profession displays an unwarranted arrogance towards the vast majority of other professions, as well as for the many members of the legal profession itself who are covered. All members of the legal staffs of business corporations, all lawyers who are in the employ of other lawyers or of law firms (exclusive of partners), and all lawyers who receive corporate directors fees (in an annual amount exceeding $400), are covered by OASI, and of course, most lawyers who are in government employment are covered by a retirement plan. Have they degraded our profession by their inclusion in a government administered retirement plan? Have executive officers of corporations, bankers, professors, architects, engineers and clergymen become degraded or lost dignity by being covered under OASI? The answer seems self-evident. It is difficult for me to see how the dignity of the profession is aided by the fact that lawyers' widows and minor children may be the only persons in their particular situation who may suffer economically because lawyers are not covered.

The proponents of exclusion shift from the philosophical to the practical with their next argument. To put it simply, they say that lawyers don't retire at 65 and consequently it would be merely a costly waste of a lawyer's money to have him pay into the OASI retirement fund. The contradiction in the two positions is self-evident—how can a government hand-out, or charity, be a bad bargain financially for the recipient? To partially answer the argument, however, maybe many more lawyers would retire if they had a pension from OASI to add to income from their own resources. Let us also bear in mind the many lawyers who are physically disabled and who cannot or should not be practicing after the age of 65.

An economic inducement such as a pension from OASI would at least result in the retirement of some members of the profession at the age of 65. Any such retirements would, of course, hasten the advancement both professionally and economically of the younger members of the profession. Industry and commerce has found it advantageous to offer "security" and the opportunity of advancement as lures to obtain the services of young men of ability. Is it less important for the great profession of the law to offer similar inducements?

Further, whether a lawyer retires or not, he may some day leave a widow who would also be entitled to rights under OASI, or minor children who would be so entitled. To glibly state that lawyers will not retire at age 65 is at best a weak argument against coverage.

In any event, why not at least give each self-employed lawyer the option as to whether or not he wants to be covered? Such an option is provided for clergymen under the new law.[8] Surely, if an individual clergyman is credited with enough sense, sagacity and business acumen to be able to decide whether OASI coverage is advantageous to him, the spokesmen for exclusion of lawyers should at the very least concede that individual lawyers also are capable of exercising this same discretion. To hold otherwise is to lower that very dignity of the profession the maintenance of which is the keystone to their opposition to coverage.

Because the amount of benefits to be received upon retirement, and the time of enjoyment of the same, depend in each case upon the age of the individual, and his earnings, and indeed upon his survival (or the survival of his wife and minor children), it is difficult to generalize as to whether coverage would be a bargain or not. However, one is buying protection for himself and his family, and the only useful yardstick as to whether the investment is a good one price-wise is the comparative one. No insurance company, to my knowledge, sells any retirement policy, the terms and conditions of which are comparable to the terms and conditions of OASI, for premiums which are even close to the amount of premiums required by OASI. Insurance agents and brokers are quick to admit that this is so, and of greater importance is the fact that all agents and brokers of my acquaintance are happy that they and their families are covered by OASI. It certainly is the cheapest protection of its kind to be found today.

To illustrate, an accountant who became newly covered under OASI on January 1, 1955, becomes fully insured on July 1, 1956. Assuming that our accountant has attained the age of at least sixty-five years at that time and that his annual earnings amounted to at least $4200 in the year 1955, and $2100 through the first six months of 1956, he can on July 1, 1956, retire[9] and receive monthly benefits of $108.50 each

7. Social Security Act §215 (a) (1) as amended by §102 (a) of P.L. 761, 83d Congress.

8. Clergymen, Christian Science practitioners and members of religious orders (other than those under a vow of poverty) may elect coverage as self-employed persons, even though they may be employees. I.R.C. §1402 (e).

9. A "retired" person under age 72, will be permitted to earn up to $1200 a year without any loss of benefits. Earnings over $1200 a year will cancel benefits at the rate of $80 (or a fraction of $80) a month. However, benefits will not be cancelled for any month in which the person neither performs substantial service in self-employment nor earns more than $80 in wages. For persons aged 72 or over who are drawing benefits, there will be no ceiling on outside earnings in taxable years starting after 1954. Rent, interest, dividends, and capital gains are not considered "earnings". §103. P.L. 761, 83d Congress.

month for the rest of his life. If his wife is also 65 years old, or when she reaches such age, she will receive $54.25 each month also. The total premium which he will have paid for such benefits will have been $189.00,[10] a remarkable rate of return. Of course, this favors newly covered persons who are close to or have already exceeded the age of 65 years. Younger persons will have to pay in for a longer period of time before becoming entitled to retirement benefits.[11]

The attraction of coverage to the young members of the profession lies, or should lie, in the extremely valuable survivors' benefits provided by OASI. By his coverage under OASI, not only is a person building rights to a pension for himself and his wife when he and she reach the age of 65, but in the meantime he is insuring his life for the protection of his wife and minor children or dependent parents. This aspect of OASI never seems to be mentioned by the proponents of exclusion, nor is it alluded to by lawyers with whom I have discussed this subject matter. The insurance protection granted to the younger participants by OASI is the same protection which a younger lawyer either cannot afford to purchase elsewhere, or if he has purchased it, he is probably groaning under the payments therefor. To these lawyers who can't "afford" to die or who (because of insurance premium poverty) can't "afford" to live, or to those who are "uninsurable" due to physical ailments, OASI coverage would be of incalculable value.

To illustrate once again with our accountant friend: if he earns $4200 in the year 1955, and $2100 in the first six months of the year 1956, and if he should die after July 1, 1956, leaving a widow and two children under eighteen years of age, his widow and children will receive $200 a month until the oldest child reaches the age of eighteen years.[12] A reduction will be made at that time in such monthly benefits, and all benefits will cease when the youngest child reaches the age of eighteen, to be resumed when the widow reaches the age of sixty-five years. All this will have been bought with a total premium payment of $189.00.[13]

The argument advanced that lawyers do not retire at 65 and therefore that they would be throwing away their money by contributing to OASI seems rather unconvincing when one considers the insurance benefits provided to a covered person's widow and minor children. The financial welfare of his family after his death is just as much a legitimate concern of lawyers as it is of other husbands and parents.

It is true that under OASI certain contributors will contribute without their or their families receiving any benefits other than the so-called lump sum settlement, which cannot exceed $225. If a covered person does not survive to age sixty-five and leaves no widow, minor children or dependent parents, there will be no benefits other than the lump sum settlement; or if a widow remarries, she loses her benefits. However, this is no different from fire insurance, casualty insurance, or automobile liability insurance. OASI is similarly insurance which is payable upon the happening of certain contingencies such as that of reaching age 65, of having a wife reach age 65, or of dying leaving children under age 18. Are these contingencies of sufficient importance to the self-employed lawyers to insure against? The proponents of exclusion apparently think not.

Finally, it has been suggested that rather than coverage under OASI, lawyers should seek the passage of legislation whereby self-employed professionals would be granted an income tax deduction for limited payments into a qualified pension fund in the pattern of the Jenkins-Keogh bill. Such legislation has certain merit, but is no substitute for OASI because there is no provision for survivorship. More important, however, does anyone reasonably expect the Congress to pass such an act to apply solely to lawyers, doctors and dentists? Or would our legislators, with good logic, tell us to come within the Social Security system just as other self-employed professionals have.

Henry Aram Malkasian was graduated from Clark University (A.B.) in 1939, and from Harvard Law School (LL.B.) in 1942. He served in the United States Army and Air Force, 1942-1946. He has been engaged in practice in Boston, Massachusetts, since 1946.

I urge every self-employed lawyer to immediately familiarize himself with the provisions of OASI. Only those provisions are referred to in this article that were deemed to be of general importance. He then will be enabled to make an intelligent decision as to whether the exclusion of lawyers from OASI is in the best interests of himself, his family and the profession. Such a reading of the Act will at least provide an informed body of opinion among those to whom this matter is of overriding importance when lawyer coverage is reconsidered in the Congress, as it surely will be. Valuable rights may be lost when too few speak for too many.

Since this article was submitted, the House of Representatives on

10. I.R.C. §1401, as amended by Sec. 207, P.L. 761, 83d Cong. Computations are based on a contribution rate of 3 per cent upon the first $4200 of earnings.
11. Footnote 7, *supra*; §102 (e) (6) P.L. 761, 83d Congress.
12. Social Security Act §203 (a) as amended by §102 (e) (7) of P.L. 761, 83d Congress.
13. Footnote 10, *supra*.

July 18, 1955, approved H.R. 725 which Bill, among other provisions, once again extends coverage to lawyers. The Bill is now in the Senate Finance Committee and will be considered in the next session of Congress. The Bill would raise rates from 2 per cent to 2.5 per cent for employees, with self-employed rates being one and one-half times the employee rate. It would also lower the eligibility age for women from 65 years to 62 years, disabled insured workers would qualify for benefit payments at age 50, and disabled children would continue to receive benefits after they reached the age of eighteen years.

Inter-American Bar Association To Meet in Dallas

■ The Ninth Conference of the Inter-American Bar Association will be held in Dallas, Texas, during the week April 16-21, 1956. Host organizations are the State Bar of Texas, the Dallas Bar Association and the Southwestern Legal Foundation.

The Inter-American Bar Association was founded in Washington on May 16, 1940, largely through the efforts of Dr. James Brown Scott and Dean John H. Wigmore. A resolution adopted by the House of Delegates at the 1937 Annual Meeting of the American Bar Association provided for the exploration of the possibilities of the formation of such an association. Committees of the Section of International and Comparative Law worked on the project and prepared the draft constitution of the Association. These efforts culminated in the formation of the Association by national representatives at Washington.

Since its organization, the Inter-American Bar Association has coordinated the activities of national and local bar associations of the American republics and has engendered interest in the formation of many new associations of lawyers. More than seventy-five organizations of lawyers are now members of the Inter-American Bar Association.

The First Conference of the Association was held in Havana, Cuba, in 1941, under the presidency of Dr. Manuel Fernandez Supervielle. The President, Secretary of State and high officials of the Cuban government and the City of Havana cordially welcomed and entertained the delegates to this Conference. Over 600 delegates, observers and guests representing forty-six member bar associations from sixteen countries were present.

Since that First Conference, the Association has grown rapidly and has achieved a unique status among Bar organizations. Subsequent meetings were held in Rio de Janeiro, Mexico City, Santiago, Lima, Detroit, Montevideo and Sao Paulo.

The Dallas Conference affords only the second opportunity for the lawyers of America to play host to their fellow lawyers from the Latin American countries. The only previous meeting in the United States was the Detroit Conference of 1949. It is important to the future of the Inter-American Bar Association that the Dallas meeting be well attended by lawyers from the United States. Having been founded primarily through the efforts of members of the American Bar Association, the Inter-American Bar Association looks to American lawyers to actively support its work and objectives.

Plans for the Dallas Conference are nearly complete at this time. In accordance with the tradition that a high-ranking member of the National Government should be present at each Conference, the Vice President of the United States, the Honorable Richard M. Nixon, will be the principal speaker at the annual banquet. Other addresses will be delivered by E. Smythe Gambrell, President of the American Bar Association, Henry F. Holland, Assistant Secretary of State for Inter-American Affairs, Allan Shivers, Governor of the State of Texas, and by many other leaders in political and legal affairs.

Learned papers will be delivered upon an extremely wide variety of subjects of interest to lawyers in the Western Hemisphere including such general topics as public and private international law, constitutional law, civil law, criminal law and procedure, administrative law and procedure, fiscal law, social and economic law, legal education, legal documentation, activities of lawyers and natural resources. A special feature of the Dallas Conference will be the first Inter-American Conference of Ministers of Justice representing all Republics of the Western Hemisphere.

The Dallas meetings will all be held in the beautiful new buildings of the Southwestern Legal Center. An exceptional entertainment program is being arranged for the pleasure of the lawyers who attend the Conference and their families.

While membership in the Inter-American Bar Association is open only to approved associations of lawyers, any member of the Bar in good standing in the countries in the Western Hemisphere may attend the Conference. Advance registration is not required, but it is suggested that in the interest of obtaining preferred hotel accommodations members of the American Bar Association who plan to attend the Dallas Conference notify the Chairman of the Committee on General Conference Information, Gordon R. Carpenter, Southwestern Legal Foundation, Dallas, Texas, at the earliest convenient date.

The President of the Inter-American Bar Association, Robert G. Storey, is a former President of the American Bar Association. The Chairman of the Executive Committee is Dr. Eduardo Salazar, of Ecuador.

Applied Legal Training:

An Experiment in Legal Education

by Charles O. Galvin · *Associate Professor of Law at Southern Methodist University*

■ **The problem of providing the fledgling lawyer with experience so that he is truly qualified to serve his clients is one that has often been discussed on the pages of the Journal, as the citations in Professor Galvin's first footnote show. The Law School of Southern Methodist University, like many other law schools, has been grappling with the problem for some time. Professor Galvin explains what has been done there and how.**

■ The storm of controversy concerning the theoretical versus the practical approach in legal education continues unabated.[1] The law schools believe that they are now offering such practical training as time and facilities will permit; yet some members of the Bar feel that the schools should do more. The schools certainly recognize the responsibility of training the young lawyer to cope with the complexities of present-day practice. The problem, however, is one of emphasis: emphasis in the curriculum in general and emphasis by the instructor in particular courses. No law school offers only so-called theoretical courses, nor does any one have only "how-to-do-it" courses. All have a mixture, and the relative degree of practicality or theory in the mixture varies from school to school because of differences in course content and differences in instructors. What can be done to assist the student in applying legal principles learned in the classroom to the problems of the law office? It is the purpose of this discussion to examine a particular law school—The Southern Methodist University School of Law—to see what is being done with respect to the practical training of its law students.

The Regular Curriculum . . . *Some Practical Courses*

For several years the faculty has required students to take courses in legal writing, practice court and brief writing and oral advocacy. The course in legal writing consists of a series of problems of the type usually encountered in practice. The student may write a short brief of the kind required of the new associate in a law office, or he may write a letter of advice to a client explaining the consequences of a particular proposed transaction. The student does his own research and the faculty member assigned to the course confers personally with each student and reviews his work not only for legal content but also for composition and clarity of expression.

In the course in brief writing and oral advocacy, transcripts of record in actual cases are assigned to the students to brief and argue on appeal. The students learn the form of the typical appellate brief and must complete the necessary research with respect to the legal questions presented. After counsel for both sides have filed briefs, they argue the case before a member of the Bar who acts as judge. Those who show particular excellence in this course are urged to enter tryouts to be representatives of the school in a regional moot court competition and in the national competition sponsored by The Association of the Bar of the City of New York.

1. Roberts, *Performance Courses in the Study of the Law: A Proposal for Reform of Legal Education*, 36 A.B.A.J. 17 (1950); Connor, *Legal Education for What? A Lawyer's View of the Law Schools*, 37 A.B.A.J. 119 (1951); Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?* 38 A.B.A.J. 907 (1952); McClain, *Is Legal Education Doing Its Job? A Reply*, 39 A.B.A.J. 120 (1953); Crotty, *Character and the Law Schools: Professional Conduct Should Be Emphasized*, 39 A.B.A.J. 385 (1953); Stason, *Legal Education: Postgraduate Internship*, 39 A.B.A.J. 463 (1953); Joiner, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools*, 6 J. Legal Educ. 295 (1954); McClain, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools*, J. Legal Educ. 302 (1954); Cantrall, *Practice Skills Can and Must Be Taught in Law Schools*, J. Legal Educ. 316 (1954); Griswold, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools*, J. Legal Educ. 324 (1954); Orschel, *Is Legal Education Doing Its Job? Brief of Amicus Curiae*, 40 A.B.A.J. 121 (1954); Stevens, *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, 40 A.B.A.J. 211 (1954); Ballantine, *Legal Education of the Future*, 40 A.B.A.J. 599 (1954); Clad, *The Gap in Legal Education: A Proposed Bridge*, 41 A.B.A.J. 45 (1955).

Charles O. Galvin received his B.B.A. at Southern Methodist University in 1940, an M.B.A. from Northwestern in 1941, and his J. D. from Northwestern in 1947. He practiced law in Dallas from 1947 to 1952 before joining the faculty of the S.M.U. Law School. He is a member of the Texas, Illinois State and American Bar Associations.

They may also participate in the senior case club which is assigned a case to brief and argue before the Supreme Court of Texas, the nine judges of which convene annually at the Law School for this purpose.

In the course in practice court, teams of two are assigned to represent each side of a case. Pleadings are filed, the cause is set down on the docket, and a trial attorney from the Bar or a state judge presides over the court. Juries are selected, witnesses examined and the case is tried in its entirety in a model courtroom having all of the facilities of an actual court.

In addition to the foregoing required courses, the student may take such elective courses as the drafting of legal instruments or may participate in the legal aid program which offers legal services to the indigent and is affiliated with the local community chest agencies. Moreover, it has been the recommendation of the faculty that each instructor should require in particular courses the drafting of instruments, term problems, or term papers insofar as he can practically do so.[2]

A Summer Program . . . *Applied Legal Training*

To supplement the above courses which have been a part of the regular curriculum, the faculty of the Law School in the summer of 1954 instituted a program of applied legal training designed not only for the law student but also for the practicing lawyer who is desirous of maintaining his proficiency with respect to new developments in the law. The faculty believes that this program is a significant experiment in legal education.

The program is offered in the summer semester to members of the Bar and to students who have satisfactorily completed their second year of law studies. It has two parts: the practice seminars and an internship plan. Members of the Bar are concerned only with the practice seminars; the students, however, may participate in either the seminars or the internship plan or both. There is emphasized in these seminars the practical approach to problems encountered in particular areas of the law. The instructors are members of the law school faculty, distinguished lawyers and judges. The subjects offered include trial tactics, problems of proof, estate planning, administrative practice, federal practice, probate practice, bankruptcy practice. Classes are held in air-conditioned facilities on the campus either in the early morning hours or in the evening, thereby permitting both practitioners and students to take the courses at a time which gives due regard for their other commitments.

The internship program, the second part of the applied legal training program, is patterned after the practical training which the medical and engineering schools have long offered to their students. The students receive experience in law offices, legal departments of corporations and in various public offices; for example, in the offices of the district and city attorneys and in the courts. The program extends over a twelve-week period corresponding with the summer semester. For four weeks the student works as a clerk for a trial judge or for an appellate judge of one of the state courts or in the offices of the federal district attorney, state district attorney, or city attorney. For eight weeks he works in a private office such as the legal department of a corporation or a law firm. Because of military camp commitments, some students participate for such lesser period of time than twelve weeks as they have available. The students report to the offices to which they are assigned during the regular working hours except for two hours each Friday afternoon during which they convene at the Law School to hear lectures by practicing lawyers and judges on such topics as law office management, settlement of litigation, trial techniques, and legal ethics.

The budgets of the public offices do not permit any compensation for the student; however, the law firms and corporations did agree to pay $15 per week during the time that the students were with them. This compensation was intentionally set at a low figure to cover just the minimum needs of the student since the faculty wanted the members of the Bar to look upon the program not as an employer-employee relationship in which the lawyer would expect services for value paid but as a training program in which the lawyer had an obligation to instruct the student during his training period.

The program could not have been successful in the initial experiment without the splendid and wholehearted co-operation of the members of the Bar. The Law School is fortunate in being situated in the industrial and commercial center of Dallas and, therefore, able to call upon attorneys in the community

2. For a discussion of what other schools are doing with similar courses see Stevens, *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, 40 A.B.A.J. 211 (1954); see also the symposium on legal education in 6 J. Legal Educ. at page 295 (1954).

with wide experience. Apparently many lawyers feel that they have a teacher's instinct of a sort, and they expressed the personal pleasure and satisfaction they experienced in the instruction and education of prospective new lawyers. All the lawyers and judges accepted their responsibilities conscientiously. For example, one of the judges had the student sit with him on the bench during the trial of cases. He explained to the student the procedural mechanics with which the trial was conducted, and after the conclusion of the day's proceedings he reviewed the trial and explained the motions and rulings which had been made. Enthusiastic co-operation came from the legal department of a large oil company. There the student was assigned for two weeks at a time to a particular attorney in the department and worked with that attorney in every activity in which he was engaged during that period. The company sent the student on its plane to various administrative hearings and trials of cases in different cities. The student attended conferences concerning negotiations with respect to purchases of property and reviewed drafts of agreements to which the company was a party. The law firms permitted the student to attend conferences, participate in the trial of cases, assist in drafting instruments, and engage in all the activities that go on in a law office. Apart from the training which the student received, his summer's work gave him the opportunity to meet and know members of the Bar and judges, which associations will be invaluable to him when he starts his professional career after graduation.

What conclusions can be drawn from this experiment with an internship program?[3] The faculty asked the lawyers and students to give a frank critique of the program at the end of the summer, and from their comments certain observations can be made:

First, it is a salable product. As a result of the enthusiasm of both the students and members of the Bar, the faculty intends to continue the program as a permanent part of the undergraduate curriculum.

Second, a member of the faculty should supervise the program, checking from time to time the students' progress in their respective assignments. Moreover, he must orient participating lawyers in connection with the plan; otherwise, there may be a tendency to treat the student as an errand boy, mail clerk, or file clerk or bury him in the library on a long brief and forget him.

Third, some of the lawyers stated that twelve weeks was not sufficient time to do all that should be done. This comment is doubtless the result of the feeling on their part that they must pour into the students all of the practical experience which normally takes years to acquire. In this connection, since the summer semester seems to be the feasible time during which the internship plan should be conducted, the faculty, for the present, at least, does not contemplate extending the program over a longer period.

Fourth, the program will have a greater appeal to the student if he can obtain academic credit for participation. This was not done in the 1954 summer semester, but the fact that the student is required to attend two hours of lecture each week would justify some credit within the rules of the Association of American Law Schools.

Fifth, there will always be students who are not financially able to sacrifice other more remunerative summer employment for the modest compensation provided by this program. Therefore, it does not seem appropriate to make participation mandatory at this time.

In summary, the faculty believes that the courses in practical training and the summer program of applied legal training given with the co-operation of the Bar will effect greater harmony between the practitioner and legal educator. By constructive planning and better understanding between the two groups, both may assist in training better lawyers for the future.

3. For other discussion of the subject, see Stason, *Legal Education: Postgraduate Internship*, 39 A.B.A.J. 463 (1953).

A poll conducted by a Minneapolis newspaper reveals some interesting public attitudes on juvenile delinquency.

The *Minneapolis Sunday Tribune* reports that two out of three men and women in Minnesota think that courts should normally follow the policy of giving juvenile offenders a second chance. Almost half of those polled thought that penalties given to juveniles by the courts were "about as severe" as they should be, but three out of ten said that the courts were too lenient.

The survey also showed that more than four out of ten favor treating juveniles like adults in courts when they become involved in adult crimes such as burglaries or hold-ups, and four fifths favor a law making parents financially responsible for damage done by youthful vandals.

Some Practical Aspects:

The SEC and the Federal Judiciary

by William H. Timbers · *General Counsel of the Securities and Exchange Commission*

■ **This is an account of the work and of some of the problems of the Securities and Exchange Commission, one of the smallest and yet one of the most important of the numerous agencies under the executive branch of the Federal Government. Mr. Timbers points out that the relationship of the SEC and the courts is of vital importance to the functioning of the former. The article is taken from an address delivered before The Association of the Bar of the City of New York.**

■ The relationship between the Securities and Exchange Commission and the federal judiciary is basically the relationship between one agency of the executive branch of the government and the judicial branch of the Government. Implicit in that relationship under our constitutional form of government is the doctrine of separation of powers, coupled with what we were taught in political science as certain checks and balances. So much for the theoretical relationship between this Commission and the judiciary.

As a practical matter, the relationship between the SEC and the courts is substantially the same as the relationship between any litigant and the courts. Counsel for the Commission, when appearing before the courts, appears not only as attorney for the Commission as a client but also appears as an officer of the court. I have discovered that the judges, and quite properly so, rarely pass over the opportunity to emphasize government counsel's role as an officer of the court. This is a precious heritage, generally recognized in the Government as the key to effective administration of an executive agency such as the SEC.

Beyond this, however, the relationship of the SEC to the courts—and the same holds true for any regulatory agency of the federal government—is a somewhat extraordinary relationship. It is extraordinary because for its very existence and particularly for the scope of its jurisdiction, the Commission necessarily must look to the courts. We administer six federal statutes[1] and we have a prescribed statutory role under Chapter X of the Bankruptcy Act.[2] It is impossible, however, to ascertain the full thrust of the Commission's statutory responsibilities by merely looking within the four corners of these statutes. Twenty years of decisional law, much of it hammered out on the hard anvil of bitterly contested litigation, has been necessary in order to add flesh and blood to the bony statutory structure. Indeed, that process still continues and, in my opinion, necessarily must continue in order to preserve the vitality of our Commission. After serving as General Counsel to the Commission for a year and a half, I have become more and more impressed with the cogency of the words Judge Learned Hand wrote to me when I first took office:

> The SEC is still young enough not to have suffered the sclerosis that has invaded such commissions as the . . . and the . . . and I am sure you will help to hold off that disease that in the end, if unchecked, will destroy the value of such organs of our government.

A quick glance at the SEC's record in the United States Supreme Court during the twenty years of the Commission's existence may serve to illustrate what I refer to as this continued process of maintaining the vitality of the Commission. During these years thirty-seven cases in which the Commission has been either a party or *amicus curiae* have come before the Supreme Court for decision on the

1. Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77; Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78; Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C. § 79; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U.S.C. § 77aaa; Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. § 80a; Investment Advisers Act of 1940, 54 Stat. 847, 15 U.S.C. § 80b.

2. 52 Stat. 883, 15 U.S.C. § 501.

merits.[3] In only six of those cases has the ultimate judgment gone against the Commission or the position it espoused.[4] Our record in the lower courts has been almost as good. I cite this record not for its box score result but as an indication of the skill with which your Government's business in this important area has been handled by the Commission's excellent staff, who through the years have so dedicated themselves to the high responsibility of their office as to bring about such a commendable record. This, I think, explains in no small measure the vital place this comparatively small agency of the Federal Government has assumed in the economic life of the nation. Incidentally, considering that the Commission is a small one—with approximately 750 employees—it is interesting to note that the SEC has contributed its fair share to the personnel of the federal judiciary, including a Justice of the Supreme Court and a Judge of the Court of Appeals for the Second Circuit.

Amicus Curiae . . . *An Important Function*

Aside from the Commission's normal role as a party plaintiff or party defendant in the usual case in which the Commission appears in court, one of its most difficult and, in my opinion, most important functions is in the role of *amicus curiae*. This is by no means a new concept nor one peculiar to this Commission. It dates back to the days of the Roman law and has been instrumental in the development of Anglo-Saxon law for more than three centuries.[5] Henry Clay appeared before the United States Supreme Court as *amicus curiae* in 1821.[6]

A Basic Conflict . . . *Two Concepts of Government*

The difficulty in determining the extent to which a Commission such as ours should participate as *amicus curiae* in private litigation stems basically from a conflict between two fundamental concepts of government: (a) a belief that the expert knowledge developed by a Commission such as the SEC over a period of years should be made available to the courts as an aid to their formulation of the decisional law construing the statutes administered by this Commission as well as the regulations promulgated under those statutes by the Commission; and (b) a belief that taxpayers' money should not be used by a governmental agency such as ours to load the dice in favor of one side or the other in private litigation where the parties are represented by competent counsel fully able to aid the court in the normal judicial process. The present Commission has given careful thought to this problem which involves elements of basic philosophy of government. I personally subscribe to the first-mentioned concept because I believe it is consistent with mature, responsible government.

In formulating an intelligent and workable policy for *amicus curiae* participation, the Commission is confronted with certain practical facts of life:

(1) A litigant naturally wants the Commission to participate on his side of any case in which the securities laws are involved because the Commission's record in litigation is an exceptionally good one. The pressure by litigants to get the Commission into a case often is a very strong pressure and frequently is implemented by pressure from Senators and Congressmen on behalf of their constituents.

(2) The courts frequently request the Commission specifically to participate as *amicus curiae*. It is most difficult for a government lawyer to advise his client not to honor such a judicial request. At the last term, the Court of Appeals for the Second Circuit on two occasions criti-

3. *Jones* v. *SEC*, 298 U.S. 1 (1936); *Landis* v. *North American Co.*, 299 U.S. 248 (1936); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419 (1938); *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *SEC* v. *U.S. Realty & Improvement Co.* 310 U.S. 434 (1940); *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941); *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941); *Marine Harbor Properties Inc.* v. *Manufacturers Trust Co.*, 317 U.S. 78 (1942); *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Fidelity Assurance Ass'n* v. *Sims*, 318 U.S. 608 (1943); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); *Brown* v. *Gerdes*, 321 U.S. 178 (1944); *Prudence Realization Corp.* v. *Ferris*, 323 U.S. 650 (1945); *Otis & Co.* v. *SEC*, 323 U.S. 624 (1945); *Young* v. *Higbee*, 324 U.S. 204 (1945); *Price* v. *Gurney*, 324 U.S. 100 (1945); *Pacific Gas & Electric Co.* v. *SEC*, 324 U.S. 826 (1945); *American Power & Light Co.* v. *SEC* (*SEC* v. *Okin*), 325 U.S. 385 (1945); *North American Co.* v. *SEC*, 327 U.S. 686 (1946); *SEC* v. *W. J. Howey Co.*, 328 U.S. 293 (1946); *American Power & Light Co.* v. *SEC* (*Electric Power & Light Corp.* v. *SEC*), 329 U.S. 90 (1946); *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946); *Penfield Co. of California* v. *SEC*, 330 U.S. 585 (1947); *SEC* v. *Chenery Corp.* (*SEC* v. *Federal Water and Gas Corp.*), 332 U.S. 194 (1947); *Engineers Public Service Co.* v. *SEC*, 332 U.S. 788 (1947); *Leiman* v. *Guttman*, 336 U.S. 1 (1949); *Manufacturers Trust Co.* v. *Becker*, 338 U.S. 304 U.S. 267 (1951); *Niagara Hudson Power Corp.* (1949); *SEC* v. *Central-Illinois Securities Corp.*, 338 U.S. 96 (1949); *SEC* v. *Otis & Co.*, 338 U.S. 843 (1949); *Mosser* v. *Darrow*, 341 v. *Leventritt* (*SEC* v. *Leventritt*), 340 U.S. 336 (1951); *SEC* v. *Harrison*, 340 U.S. 908 (1951); *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1953); *Wilko* v. *Swan*, 346 U.S. 427 (1953); *General Protective Committee* v. *SEC*, 346 U.S. 521 (1954); *Bentsen* v. *Blackwell*, 347 U.S. 925 (1954); *SEC* v. *Drexel & Co.*, U.S. (1955).

4. *Jones* v. *SEC*, 298 U.S. 1 (1936); *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U.S. 78 (1942); *Fidelity Assurance Ass'n* v. *Sims*, 318 U.S. 608 (1943); *American Power & Light Co.* v. *SEC*, (*SEC* v. *Okin*), 325 U.S. 385 (1945); *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946); *Manufacturers Trust Co.* v. *Becker*, 338 U.S. 304 (1949).

5. Apparently the practice of assisting a court at the latter's request was already known to the Roman law, where the *judex* sought the assistance of a *consiliarius* in the solution of difficult questions of law. The practice of making suggestions to a court on some point of law by a person not a party to the action was early established in the common law; reference to it is made in the Yearbooks during the reign of Edward III (1327-77), Henry IV (1399-1413), and Henry VI (1422-61). In the *Prince's Case*, 8 Co. Reps. 1, 77 Eng. Rep. 480, 516 (1606), *amici curiae*, who in that case were also parties, were chided by the court for deceiving it in citing an old statute without disclosing a pertinent clause thereof. Apparently one of the principal functions of *amici* at that time was to bring to the attention of the court old statutes and decisions of which there was little or no record. Apparently any bystander, whether or not requested to do so, could advise the court of legal error. In *The Protector* v. *Geering*, 145 Eng. Rep. 394 (1656), *amici* moved to quash an inquisition for outlawry. "It is for the honor of a court of justice to avoid error in their judgments . . . Errors are like felons and traitors, any person may discover them. . . ." In *Horton* v. *Ruesby*, 90 Eng. Rep. 326 (1687), it was held that the Statute of Frauds did not void a conveyance even though execution was not had thereon until after the death of the conveyor. "Sir G. Treby (*ut amicus Curiae*) said that he was present at the making of the said statute, and that was the intention of the Parliament." Query whether today a former Congressman could so testify as *amicus* with respect to a statute enacted while he was sitting.

[The foregoing and other cases are summarized in II Viner's Abridgment, 2d ed. 1791, and the entire subject is well discussed in Beckwith and Sobernheim, *Amicus Curiae—Minister of Justice*, 17 Fordham L. Rev. 38 (1948).]

6. In this interesting early Supreme Court case involving the participation of an *amicus*, *Green* v. *Biddle*, 8 Wheat. (21 U.S.) 1, 17 (1821-3), claimants to land in Kentucky under patents granted by Virginia prior to the establishment of Kentucky as a separate state in 1792 argued that laws passed by Kentucky in 1797 and 1812, granting certain rights to Kentucky tenants in possession against persons who successfully established paramount title,

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cized the Commission for failure to participate as *amicus curiae*:

(a) In *Blau* v. *Mission Corp.*,[7] Circuit Judges Clark, Frank and Hincks stated:

> In previous decisions involving the interpretation of this remedial statute we have been aided by detailed expositions of relevant factors by the Securities and Exchange Commission as *amicus curiae*, and we regret the lack of their aid in this case. Accordingly, we proceed with due caution in venturing upon uncharted seas.

(b) In *Roberts* v. *Easton*,[8] Circuit Judges Clark, Medina and Harlan stated:

> The Securities and Exchange Commission, as we are informed and to our regret, see *Blau* v. *Mission Corp.*, *supra*, has declined an invitation to express its views as *amicus curiae*.
>
> * * * *
>
> Thus left to our own resources we are not inclined at this juncture to attempt enunciation of a black-letter rubric.

In many other cases the courts, including the Second Circuit, have commented favorably upon the aid rendered by the SEC in its role as *amicus curiae*.

(3) Budget limitations alone, however, necessarily make it impossible for our Commission with its dwindling staff to participate in all cases involving construction of statutes administered by the Commission or rules and regulations promulgated by the Commission under such statutes. Accordingly, the Commission necessarily must select with care those cases in which it is to participate as *amicus curiae*.

During the past year and a half I have endeavored to obtain first hand the views of various federal judges upon the subject of SEC *amicus curiae* participation. Their views may be summarized as follows:

(1) The SEC should participate *where the issue is extremely technical* and *where the Commission's superior expert knowledge should be made available* to the judicial branch of the Government.

(2) The SEC should participate where it is important that the court should be apprised of the Commission's *administrative experience* with respect to the statutory provision or rule under consideration.

(3) The SEC should participate where *a novel question of statutory construction or rule interpretation is involved*—to the end that an appropriate judicial precedent may be obtained which will aid in the future administration of a statute or rule.

Accordingly, these are the principal considerations taken into account by the Commission in determining whether to participate as *amicus curiae* in a given case.

The following procedure is recommended to members of the Bar who desire to obtain participation by the SEC as *amicus curiae* in a given case:

(1) Informal request for the staff view on a particular question before the case gets into litigation.

(2) After commencement of suit, informal conference with the staff regarding its position on the particular question involved.

(3) Formal written request addressed to the Commission to participate as *amicus curiae* in a particular case. Such request should be accompanied by pleadings or printed record and briefs.

(4) After review by the staff, a recommendation either for or against *amicus curiae* participation is presented by the General Counsel to the full Commission which makes the ultimate determination.

(5) In the event a case is submitted to the court without SEC *amicus curiae* participation, a request addressed by the court to the Commission to file a brief will be given careful consideration by the Commission.

The case of *Wilko* v. *Swan*,[9] decided recently by the Supreme Court, may serve to illustrate the circumstances under which the Commission (a) on the one hand will participate as *amicus curiae*, and (b) on the other hand will not so participate. That case involved the validity of a pre-litigation stipulation (contained in a margin agreement) to arbitrate any dispute between the purchaser of securities and the brokerage house from which they were purchased. Suit was brought in the District Court for the Southern District of New York to recover the purchase price of securities which the plaintiff claimed were sold to him under fraudulent representations. Believing that an important question involving the effectiveness of the civil liability provisions of the securities laws was involved, the Commission filed a brief as *amicus curiae* supporting the plaintiff's po-

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were an unconstitutional impairment of a compact made in 1789 between Virginia and the proposed state of Kentucky, under which compact the rights to land of claimants under prior Virginia patents were to be governed by the law of Virginia. In March, 1821, Justice Story held for the Court that the Kentucky statutes were unconstitutional as an impairment of the prior compact. Thereupon on March 12, 1821, Henry Clay as *amicus curiae* moved the Court for reargument and stay of mandate, inasmuch as the tenant in the case had not put in an appearance and the Court's adjudication involved the rights and claims of numerous occupants of land in Kentucky. The motion was granted. Thereafter in 1822, Clay and others argued to the Court in favor of the Kentucky enactments, but in its final opinion delivered in 1823, the majority of the Court adhered to the view expressed earlier by Justice Story.

7. 212 F. 2d 77 (2d Cir. 1954), *cert. denied*, 347 U.S. 1016 (1954).

8. 212 F. 2d 82 (2d Cir. 1954), *cert. denied*, 348 U.S. 827 (1954).

9. 346 U.S. 427 (1953).

sition. From an order denying the brokerage firm's motion to stay proceedings until the matter could be submitted to arbitration, the brokerage house appealed to the Court of Appeals for the Second Circuit. The Second Circuit, by a divided court, rejected the Commission's position and reversed the judgment of the district court, thus sustaining the validity of the arbitration agreement. The Commission filed a brief in support of the purchaser's petition for certiorari which was granted. In the Supreme Court the Commission assumed the laboring oar on behalf of the petitioner and obtained a reversal of the Second Circuit in an opinion which struck down the arbitration agreement. Upon remand to the district court, the case in due course proceeded to trial upon disputed issues of fact. At that stage plaintiff's counsel urged the Commission to participate as *amicus curiae* on behalf of the plaintiff in the district court. This the Commission declined to do. The disputed issues of fact were tried to a jury which returned a verdict on the special questions submitted, deciding those issues in favor of the defendant in some respects and disagreeing on some issues. Upon examination of the briefs submitted by both parties in connection with the plaintiff's motion to set aside the verdict, the Commission found that certain statements contained therein were not in accord with well-established principles of law. The Commission addressed a letter to the court briefly pointing out what it believed to be erroneous statements of law contained in the briefs and offering to file a brief as *amicus curiae* if called upon by the court to do so. The court, without requesting the Commission to file a brief, subsequently filed an opinion deciding the questions under the federal securities laws, correctly as we believe.[10]

The Bankruptcy Act . . . *Functions of the Commission*

The function of the Commission in a reorganization under Chapter X of the Bankruptcy Act presents an interesting illustration of the relationship between the SEC as an agency of the executive branch of the Government and the judiciary. Aside from the mandatory functions of the Commission under Chapter X, there is a large area in which the Commission's participation under Chapter X is discretionary. In this discretionary area the problems which confront the Commission in determining whether to participate are not unlike the problems confronting the Commission in determining whether to participate as *amicus curiae* in private litigation.

Before discussing the nature of the Commission's functions under Chapter X, I should like to mention the part played by the Commission in the last major amendment of the Bankruptcy Act in 1938. Under Section 211 of the Securities Exchange Act of 1934, Congress directed the Securities and Exchange Commission to make a study and investigation of the activities of protective and reorganization committees and to report the results of its study and its recommendations. The Protective Committee Study of the Commission did make an intensive inquiry into committee practices in the entire field of reorganization, including bankruptcy reorganizations, and reported to Congress in eight printed volumes. This report concluded that in reorganizations many abuses existed contrary to the interest of public investors. Generally those abuses involved conflicts of interest; exorbitant costs; control of reorganizations by those who should not have had control; lack of information for public investors, parties in interest and the courts; undue pressures upon the courts and security holders; and lack of adequate procedures and facilities for assuring fair and feasible plans. Chapter X was enacted to meet these abuses in the reorganization field.

Pointing out that the traditional jurisdiction of the federal courts over corporate reorganization had been developed under Section 77B of the Bankruptcy Act into a generally appropriate and acceptable form of proceeding, the Commission recommended that the supervision of reorganizations by the courts should not be replaced by that of an administrative agency. Rather, the Commission recommended that the powers of the courts be broadened and their decisions made more effective by requiring the appointment of an independent trustee and by affording the courts the assistance of an administrative body, expert in financial and business affairs. In addition to these recommendations, the Commission advocated other changes which, among other matters, involved giving creditors and stockholders greater rights to participate in reorganization proceedings and assuring their receipt of adequate information upon which they could base their participation in a reorganization or their vote on a plan of reorganization.

The Commission, during 1937 and 1938, together with members of the National Bankruptcy Conference, assisted in drafting a new section on reorganization in the proposals to amend the Bankruptcy Act. The Congressional Committee Reports, in addition to reporting on other aspects of the proposed bill, pointed out the defects in Section 77B, concluded that it required a complete revision, and indicated that the defects had been dealt with and corrected in Chapter X.

In substance, the Commission's basic recommendations were adopted by Congress. An independent trustee is required to be appointed in all Chapter X cases involving debts of $250,000 or more (Section 156). His counsel is likewise required to be independent (Section 151). The Chapter X trustee is given the duty to investigate the affairs of the debtor, as directed by the judge, and to report the results to the judge, including any fraud, misconduct, mismanagement or irregularities (Section 167). A report on the financial condition of the debtor

(Continued on page 1178)

10. 127 F. Supp. 55 (S.D. N.Y., 1955).

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■ *Bigness and Trial Publicity*

One of the insoluble and ever-present problems in the administration of justice is how to attain the ideal of a public trial without depriving the individual of his right to individual treatment. In the case of the youthful offender we do not even nod in the direction of a public trial. On the other hand, a defendant who insists on his right to have the sordid details of his trial publicized has been held to be entitled to that doubtful privilege. From the standpoint of the average witness, however, the publicity involved in legal proceedings is an unmixed evil. Most of them suffer so much from stage fright that they can hardly give responsive answers. When we find one who is not overawed by appearing in public, it usually develops that he is an exhibitionist so much more interested in the impression that he is making than in the accuracy of his testimony that he is of even less assistance in the administration of justice.

We are now threatened with an aggravation of both of these evils as part of the bigness that increasingly characterizes every activity of the human race. There is an insistent demand that the audience before whom witnesses must testify shall be expanded to embrace all whose ears and eyes can be reached by the miracles of radio and television. That would give a public trial with a vengeance, but the advantage that would accrue to the individual litigant is not immediately apparent. Yet hard as it would be on the administration of justice, the march of the idea seems to progress with the inevitability of fate in Greek drama. The importance of the subject merits the closest study and the clearest exposition by both sides and the most earnest attention by those who are still unconvinced by either side.

At the Annual Meeting of the Association in Philadelphia this year radio and television coverage was demonstrated in such fashion as to inspire J. Frank Beatty to assert in his article "The Silent Witness" in the August 29, 1955, number of *Broadcasting Telecasting* that "television had its day in court". Whatever our views may be, we can all agree that it shall have its day in court on the question whether it shall have its place in court.

This expansion of the audience is not merely threatened by radio and television. It has actually been accomplished by the press. As Eustace Cullinan said in his article "The Rights of Newspapers: May They Print What They Choose?" in the November issue of the JOURNAL, the modern press with its huge circulation and influence has a function of providing entertainment as well as information and instruction. The remaining rural counties in our country are dotted with old courthouses where the spectators' seats are arranged in an amphitheater with row upon row descending to the pit where the lawyers and witnesses perform for the edification of the citizenry. Will the same force that has expanded the corner grocer into the supermarket expand the audience at the trial in the country county seat into a nationwide multitude of amusement seekers? It is ours to give, and perhaps control, the answer.

■ *Lawyers and Accountants*

When in October of 1913, following the adoption of the Sixteenth Amendment on February 25, 1913, the Congress of the United States adopted a Revenue Act which imposed upon corporations a tax of one per cent of net income, little did anyone believe that would lead to a bitter controversy between lawyers and accountants which has assumed nationwide proportions in the past two years. Before the income tax law structure became so complex, it was a simple matter for the certified public accountant to take the necessary information from books of account and transfer the figures to a tax return.

Since World War I, income tax measures have provided increasingly important shares of the revenues required for financing the Federal Government, and the

determination of business income became a problem involving technical questions of great complexity. The tax is levied by a statute and the interpretation of the statute is clearly practice of law. On the other hand, the tax is levied upon income, which is an accounting concept. Thus we have a situation where for tax purposes business income is actually determined in part in accordance with generally accepted accounting principles and in part in accordance with the law.

There is therefore every reason for lawyers and certified public accountants to work together. In fact the public interest requires it. Every joint statement issued by the American Bar Association in conjunction with the American Institute of Accountants since negotiations between the two groups first started in 1935 has recognized that basic principle. Yet today the two professions are still as far apart as the poles.

In a brilliant analysis of the problem appearing elsewhere in this issue under the caption "A Further Look at Lawyers and Accountants in Tax Practice", Dean Erwin N. Griswold of the Harvard Law School deplores this situation. He effectually distinguishes between an accountant working with the tax statutes as an incident to supporting a tax return prepared by him and an accountant advising on questions of law clearly beyond his field. Furthermore Dean Griswold delineates the danger involved where the accountant attempts to act as advocate. It would be well for the accountants to read his article and take to heart the advice he gives.

■ *The Lawyer's Role in Adoption*

The subject of child adoption is one with which most lawyers in general practice are familiar, and one with which they have had some practical experience. Cases of child adoption occur rather infrequently but when they do arise the experience is usually heartwarming and very satisfactory to all the participants. Such cases normally result in bringing happiness and joy into otherwise childless homes and afford an opportunity for a more or less secure future to homeless waifs and orphans. As the demand on the part of the public for children for adoption purposes has increased without a corresponding increase in the number of children available for adoption, there have been cases of black markets and instances of commercialism which state authorities have been forced to recognize and take means to guard against. The entire subject is one that carries with it a great humanitarian appeal and for that reason, if no other, the JOURNAL brings to its readers an article on "Lawyers and Adoption". The authors of this article are husband and wife, the husband a practicing lawyer and the wife a worker experienced in child welfare procedure. Lawyers may take issue with some, at least, of the conclusions reached by the authors. The fact that when you read it you may disagree with some of the authors' statements does not detract from its value and you will undoubtedly acquire some useful information on the subject of adoption as well as some ideas of what an experienced welfare worker feels a lawyer should do and, just as important, should not do, when a request for help in an adoption case comes to his office.

■ *Social Security for Lawyers*

At the meeting of the House of Delegates last February, action was taken reversing its previous position on lawyers and social security. Upon the recommendation of the Board of Governors, it was decided that the Association should favor the inclusion of self-employed lawyers on a voluntary basis within the provisions of the Social Security Act. From information at hand the Board had become convinced that the then sentiment of the Bar favored this, and that in its resolution the Association should favor the inclusion of such other professional groups as desired to be included.

The question had been before the House for some years. At the mid-year meeting in 1950 the President was authorized to create a Special Committee on Social Security and at the Annual Meeting in that year this Committee became the Standing Committee on Unemployment and Social Security.

Also at the 1950 mid-year meeting, on recommendation of the Board, the House resolved to oppose legislation to bring self-employed lawyers under Social Security and authorized the Committee to present the position of the Association to the appropriate committees of Congress in connection with opposition to H.R. 6000 and any other bill directed to the coverage of self-employed lawyers.

Since then the subject has been frequently before the House without positive action—at the mid-year meeting in 1953 when a proposed resolution in opposition to the coverage in question was tabled; at the Annual Meeting of the same year when a resolution to adhere to the previous action was proposed and then withdrawn; at the Mid-year meeting in 1954 without formal action; at the Annual Meeting of that year when a resolution to reaffirm the Association's opposition was referred to the National Conference of Bar Presidents; and finally, as unfinished business, at the meeting last February when the House approved this coverage.

The problem has not been easy of solution and we are glad to present in this issue the admirable article by Mr. Malkasian, sustaining *pro tanto* the view of the Board and the House as to the present attitude of the Bar.

1,474 Lawyers Attend St. Paul Regional Meeting

■ The third American Bar Association regional meeting of 1955, held October 12-15 in St. Paul, Minnesota, attracted 1,474 registrants from seven states and three Canadian provinces. This made it one of the largest regional meetings yet held. The registration consisted of 1,037 men and 437 women, the latter including wives and guests. Ninety of the registrants were lawyers and judges from the Canadian Provinces of Manitoba, Saskatchewan and Ontario.

Program quality and entertainment during the three days of the meeting matched the exceptional attendance. There were institutes and workshop sessions on sixteen phases of law and professional relations. Each evening there was a special hospitality event—the Ramsey County Bar Association and the Hennepin County Bar Association each was host at receptions, and on the closing night of the meeting the main banquet attended by 850 was treated to an unusual ice show and symphony concert in the arena section of the St. Paul Auditorium. The ice show was staged by the Figure Skating Club of St. Paul.

The international flavor of the meeting received colorful recognition when the Canadian guests, arriving by special train the morning of October 12, were met at the station by the famed Macalester College Bagpipe Band. The Friday program, designated as "Canadian Bar Day", featured a luncheon at which Justice Samuel Freedman, of the Court of Queens Bench, Winnipeg, was the main speaker. Special plaques were awarded the bar associations of the three participating provinces.

President E. Smythe Gambrell of the American Bar Association, a speaker at the Assembly session and also at the banquet, termed the St. Paul meeting "one of the finest regional meetings yet presented, offering fresh evidence of the strength and vitality of the regional meetings program designed to bring the Association into closer contact wth practicing lawyers in every section of the country."

In addition to President Gambrell, some of the special events speakers participating in the program included Charles S. Rhyne, Washington, D. C., Chairman of the Regional Meetings Committee; Judge Walter M. Bastian, of the U.S. Court of Appeals for the District of Columbia Circuit; Warren E. Burger, Assistant United States Attorney General; E. C. Leslie, Vice President of The Canadian Bar Association; John M. Palmer, President of the Minnesota State Bar Association; Governor Orville Freeman, of Minnesota; Mayor Joseph E. Dillon, of St. Paul; Chief Justice J. E. Adamson, of Manitoba; Chief Justice W. M. Martin, of Saskatchewan; David F. Maxwell, Philadelphia, former Chairman of the House of Delegates, and William J. Jameson, of Billings, Montana, a past President of the Association.

Institutes or special programs were held on the following subjects: civil jury trial techniques; taxation; administrative law; traffic courts and highways; labor relations; insurance law; public relations; practical evidence; unauthorized practice of law; real property, probate and trust law; legal aid and lawyer referral; fees and law office management; corporation, banking and business law; antitrust law and municipal law.

The Most Reverend William O. Brady, of Sioux Falls, South Dakota, celebrated a special Red Mass in the Cathedral of St. Paul on October 13.

The various programs were staged

(Continued on page 1161)

Scene at the St. Paul Auditorium during the main banquet at the Northwestern Regional Meeting. The tables were placed around the skating rink on which the St. Paul Figure Skating Club gave an exhibition following the banquet.

(Continued from page 1091)
research and in providing better tools for service to clients.

We have been apathetic and complacent too long. We cannot stand still. Like any business that survives, a profession must study the needs of the people and keep pace with changing conditions that bring changes in the nature of services the public demands of it. We cannot expect the one fourth of the nation's lawyers who constitute the present membership of this Association to carry this increasing burden of professional responsibility.

Every lawyer in America has a personal stake in this enterprise. It is a long overdue step to give the legal profession new unity, direction and force. It is an essential step toward marshaling our vast untapped resources and for accomplishment of objectives that will improve the position of our profession in the eyes of the public and awaken our own members to a realization that we do have the resources to cope with our problems if we only will put them to work.

Hundreds of present members of the Association either have been or will be called upon to help in this huge undertaking. I am confident they will respond. In the first days of organization work I personally asked some of the busiest lawyers in the country to take on time-consuming posts of leadership in the campaign organization, and not one refused. They didn't even hesitate. This was a heartening experience, because it proved that lawyers generally are becoming more aware of current needs and are ready to help meet them.

Elsewhere in this issue of the JOURNAL appears an article giving additional details of the campaign and listing those who have accepted appointments as members of the national executive committee and as circuit chairmen under the strong leadership of Cecil E. Burney, of Texas, who also is Chairman of the National Conference of Bar Presidents and a former president of the State Bar of Texas. We are fortunate indeed to have such high quality leadership. But in the last analysis the success of the campaign will depend upon how well every present member of the Association, and every other thoughtful lawyer, judge and law teacher, catches the spirit of this joint enterprise and its vast possibilities for greater professional service and achievement.

The fall meeting of the Board of Governors reflected rising enthusiasm for the tasks which lie before us as a profession. Its unanimous approval of the current membership campaign gives that project top priority. Plans for the 1956 Annual Meeting in Dallas next August were discussed and tentatively approved. It is clear that in size, content and distinction it will be the greatest ever. And plans for the 1957 Annual Meeting to be held in New York and London are under consideration. All indications are that thousands of American lawyers look upon the London pilgrimage as the opportunity of a lifetime to visit the cradle of the common law under most auspicious circumstances.

At the fall meeting of the American Bar Foundation several projects, including the Survey of the Administration of Criminal Justice and the completion of the organization of The Fellows of the American Bar Foundation, were considered.

Concurrently with my executive duties at the Bar Center, I am continuing to enjoy the fellowship of state, local and other bar meetings in all parts of the country. Since last reporting, I attended the fine Annual Meeting of the West Virginia State Bar at Wheeling, where President Clarence E. Martin, Jr., incoming President William P. Lehman, Judge Frank C. Haymond, Thomas B. Jackson, and several hundred leaders of that state extended unbounded hospitality. Then came a beautiful luncheon of the Legal Section of the American Life Convention at its Annual Meeting in Chicago. President F. W. Hubbell, Chairman Willis H. Satterthwaite, General Counsel Ralph H. Kastner and a multitude of other fine spirits in that great organization made the day a most pleasant one for me.

The Northwest Regional Meeting of the Association at St. Paul, under the leadership of Committee Chairman Charles S. Rhyne and local chairmen William W. Gibson, Ivan Bowen, John B. Burke, John M. Palmer, Clifford W. Gardner and Sidney P. Gislason and others, was attended by more than 1,600 lawyers and wives from seven states and three Canadian provinces. The Canadian group, led by D. Park Jamieson and E. C. Leslie, included several distinguished members of the judiciary and more than 100 leading lawyers, who added much to the good fellowship and success of the meeting. The diversified program of substance, inspiration and entertainment made this one of the greatest and most colorful meetings in history.

Law Day at Mercer University, Macon, Georgia, under the leadership of Dean F. Hodge O'Neal, was a notable occasion in which I was privileged to participate, along with Walter F. George, Allen Dulles, Robert B. Troutman, C. Baxter Jones and other bar leaders.

An experience always to be remembered was my exciting four-day visit to Alaska, including banquets amid lavish hospitality at Juneau, Anchorage, Fairbanks, Nome and points beyond the Arctic Circle. State Delegate Robert E. Robertson and State Association Delegate John E. Manders, along with Henry Roden, Mike Monagle, Ed Merdes, Herbert Faulkner, Fred Eastaugh, Howard Stabler, Harold Butcher, Ed Davis, Warren Taylor, Julien Hurley, Charles Clasby, James von der Heydt and others, are undertaking to lift Alaska from fifth place to first place in Association membership percentage—and already have passed Arizona to take fourth place. United States District Judges Vernon Forbes, Walter H. Hodge, J. L. McCarrey, Jr., and the lawyers made a festive occasion of the first visit of an American Bar Association President to the territory and made it clear that this great unexploited area of our country is "on the march".

Association Begins Drive

To Double Its Membership in February

■ A far-reaching decision was announced November 3 when the American Bar Association declared that it is placing in motion a plan to increase its membership by at least 50,000 within the next four months.

This will be the largest organizing campaign ever conducted by a national professional group.

E. Smythe Gambrell, of Atlanta, Georgia, President of the Association, said, "Our problem is to keep the legal profession abreast of changing conditions in today's economic and social order. The American Bar Association has accepted that challenge.

"We want every American lawyer to be an active member of the American Bar Association.

"We must immediately double the membership of the national organization if the legal profession is to carry out its great objectives. These include improving the administration of justice, maintaining high standards of legal education and ethics, and extending legal services to all who need them."

The organization of the campaign will be climaxed in February when hundreds of Association recruiting teams will make a simultaneous canvass of prosepctive members throughout the country.

The American Bar Association now has about 24 per cent of the potential membership among the nation's lawyers, judges and law teachers, while other professional organizations have much larger percentages of membership from their groups. Eighty-six per cent of the dentists belong to the American Dental Association, the American Medical Association has enrolled 83 per cent of the doctors, and 50 per cent of the accountants belong to the American Institute of Accountants.

Cecil E. Burney of Corpus Christi, Texas, Chairman of the National Conference of Bar Presidents and former president of the State Bar of Texas, is chairman of the executive committee which will direct the campaign.

"There is no room for snobbishness in the national organization of the legal profession," said Mr. Gambrell. "Our profession exists for the benefit of the public and must justify its existence by its service to the public."

He added in a statement:

"The American Bar Association is embarking on a long-overdue campaign to double its membership and resources—to bring the rank and file of the country's lawyers into its various enterprises for the benefit of the public and the profession.

"The legal profession cannot afford to be longer stigmatized by the fact that the percentage of lawyers in our national organization is only one third of the membership percentages in other professions. Nothing short of a 'mass revival' can marshal our forces and keep us spiritually, culturally and technically fit and in step with the amazing developments of this era."

Several thousand of the leading members of the Bar in every section of the country will participate actively in the drive.

The campaign executive committee headed by Mr. Burney includes two former Presidents of the Association—William J. Jameson, of Billings, Montana, and Robert G. Storey, of Dallas, Texas. Other members of the Committee are William T. Gossett, of Dearborn, Michigan, Vice President and General Counsel of the Ford Motor Company; Stanley B. Balbach, of Urbana, Illinois, Chairman of the Junior Bar Conference; Thomas E. Taulbee, of Wilmington, Delaware; Donn Gregory, of Tampa, Florida; Archibald M. Mull, Jr., of Sacramento, California; and Orison S. Marden, of New York City. Also serving is William Clarke Mason, Philadelphia, Chairman of the Special Committee which recently developed the new Association Group Life Insurance Plan.

The Junior Bar Conference Executive Committee for the campaign is composed of William C. Farrer, of Los Angeles, Robert G. Storey, Jr., of Dallas, C. Frank Reifsnyder, of Washington, D.C., and William Reece Smith, Jr., of Tampa.

The Advisory Committee is composed of Judge Florence E. Allen, of the United States Court of Appeals for the Sixth Circuit, Chief Justice W. H. Duckworth, of the Supreme Court of Georgia, Chief Justice Arthur T. Vanderbilt, of New Jersey, Howard L. Barkdull, of Cleveland, Ohio, Charles A. Beardsley, of Oakland, California, Cody Fowler, of Tampa, Florida, Harold J. Gallagher, of New York City, Tappan Gregory, of Chicago, Illinois, Joseph W. Henderson, of Philadelphia, Pennsylvania, Frank E. Holman, of Seattle, Washington, William J. Jameson, of Billings, Montana, Jacob M. Lashly of St. Louis, Missouri, Carl B. Rix, of Milwaukee, Wisconsin, Henry Upson Sims, of Birming-

The following have been named as Circuit Leaders:

Seniors	*Junior Bar Conference*
First Circuit	
Willoughby Colby 39 North Main St. Concord, N. H.	Fred G. Fisher, Jr. 60 State St. Boston 9, Mass.
Second Circuit	
Richard H. Bowerman 205 Church St. New Haven 9, Conn.	Donald Maroldy Socony-Vacuum 230 Park Ave., N.Y., N.Y.
Third Circuit	
David F. Maxwell Packard Building Philadelphia, Pa.	Daniel Huyett III Colonial Trust Bldg. Reading, Pa.
Fourth Circuit	
Lewis F. Powell, Jr. Electric Building Richmond, Virginia	James Ballengee Security Bldg. Charleston 26, W. Va.
Fifth Circuit	
C. Baxter Jones, Jr. First Nat'l. Bank Bldg. Atlanta, Georgia	Robert R. Richardson 825 C & S Nat'l. Bank Bldg. Atlanta, Georgia
Sixth Circuit	
Ed Kuhn Commerce Building Memphis, Tennessee	Thomas Carroll Kentucky Home Life Bldg. Louisville, Kentucky
Seventh Circuit	
Karl C. Williams Rockford News Tower Rockford, Illinois	C. Severin Buschmann, Jr. Circle Tower Bldg. Indianapolis, Indiana
Eighth Circuit	
Edward H. Jones Equitable Building Des Moines, Iowa	John C. Deacon McAdams Trust Bldg. Jonesboro, Arkansas
Ninth Circuit	
Roy A. Bronson Mills Tower Building San Francisco, California	Harry L. Kuchins, Jr. 155 Montgomery St. San Francisco, California
Tenth Circuit	
Ross L. Malone Roswell Petroleum Bldg. Roswell, New Mexico	Vernon T. Reece Central Bank & Trust Co. Denver, Colorado

ham, Alabama, Robert G. Storey, of Dallas, Texas, Guy A. Thompson, of St. Louis, Missouri, and Loyd Wright, of Los Angeles, California.

The Junior Bar Conference, running its campaign independently but parallel with the Association's drive, is organized to solicit 15,000 new members under age 36—almost one third of the total goal and more than double the Junior Bar's current membership of 12,541.

As this issue goes to press, all major organization assignments have been completed and the momentum of the campaign is increasing at a pace indicative of success. Between November 6 and 28, all ten Circuits held organizational rallies of state and metropolitan chairmen. The enthusiasm and dedication exhibited by these key lawyers from all over the nation underscored the validity of the goal.

Cecil E. Burney

Key to the campaign is this statement by President Gambrell: "The privilege of belonging to the American Bar Association is open to every lawyer in good standing—and we want him to know it."

High on the list of assets attractive to new members, as revealed by an opinion poll, are these tangible benefits: Group Life Insurance Plan for members—benefits up to $6,000 for only $20 a year. Continuing legal education—through seventeen specialized "bread-and-butter" Sections open to every member. Recognition—in the Martindale-Hubbell Law Directory and by other forms of identification. Publications—including the monthly issues of the JOURNAL. Services—exemplified by a new service of the Research and Library Center, which is prepared to give any member a photostatic copy of court opinions, statutes, law review articles and other similar data material, subject to copyright restrictions, on request and at a nominal charge.

Recognizing the necessity of informing prospective members of this opportunity, the Association has inaugurated an intense publicity program. The co-operation of the press, both public and professional, has already brought national recognition to the campaign.

Books for Lawyers

NINE MEN: *A Political History of the Supreme Court of the United States from 1790 to 1955. By Fred Rodell. New York: Random House. 1955. $5.00. Pages 338.*

In his foreword Professor Rodell makes the following comment upon his book: "It may be that lawyers will not understand it, because it is not written down to them. I have done my best not to use the easy slang (once you have learned it) of long-worded legal language, which too often lets off-the-real-point thinking become a habit. More than that, I have kept completely away from matters that would interest only lawyers—from Supreme Court cases that deal with anything other than the part the Court plays in the way this nation is run; Erie v. Tompkins, 'a great legal landmark,' (what it said was that federal judges, when handling private legal squabbles, should use a different set of rules from those they had used before) is not even mentioned—except here. My interest and, I think, most people's interest in the Court is in what it—or rather the men who man it—have done on the (dirty word) political scene for 165 years." This paragraph is a condensed statement of the author's estimate of his chosen profession, of his professional brethren and of what has been accomplished in the name of the Supreme Court by the men who have used their judicial robes to conceal the fact that all the while they have been playing politics.

Those lawyers who do not resent the author's low estimate of their intelligence and who read the volume through will feel amply rewarded for their effort. They will find that the book is quite within their intellectual grasp—and is, as far as the author is concerned, an interesting bit of self-revelation.

A historian of the Court has a choice between two methods of treating his subject. One is to regard the Court as an instrument of government and to determine whether on the whole it has served the American people well. The other is to use his own conviction on controversial questions as a standard of judicial measurement and in all cases in which decisions have not conformed to that standard, to attribute the fact to the concealed political preferences of the individual justices responsible for the public misfortune.

The reader will determine for himself which of these two approaches is the more likely to result in helpful and constructive criticism. Perhaps he will be aided in his determination by a specific illustration of Professor Rodell's method of accounting for a particular decision. Such an illustration is to be found at page 30 where the reader will find the following: "It is superficial, however technically true, to say, for example, that 'the Supreme Court,' in 1935, declared unconstitutional the New Deal's railroad retirement act (under which all railroads would have had to chip in to a compulsory insurance fund to pay annuities to retired railroad workers over the age of 65). It is somewhat more accurate, more meaningful, and more revealing to say that five Supreme Court Justices —one of whom made the legal reputation that led to his Justiceship as a lawyer for the Great Northern, the Northern Pacific, and the Chicago, Burlington, and Quincy Railroads (Butler); one of whom was kicked upstairs to the Court because of his cantankerousness as Attorney-General, including his reluctance to prosecute the New York, New Haven, and Hartford Railroad on antitrust charges (McReynolds); one of whom had made a small fortune and a large legal name for himself by representing, in government and out, the Union Pacific Railroad (Van Devanter); one of whom had been a close Senate friend of a certain Senator Harding who later as President, named him to the Court, after the voters of Utah had refused to reelect him because of his reactionary Senate record in behalf of corporations, including railroads (Sutherland), and one of whom, as a former Philadelphia lawyer, had counted among his several large corporate clients the Pennsylvania Railroad plus its affiliates (Roberts)—that these five Justices outvoted their four considerably abler colleagues (Hughes, Brandeis, Cardozo, and Stone—who dissented) and thus negated the will of Congress, the will of the Administration, and presumably the will of the people of the country, as well as, quite coincidentally of course, saving money for the railroads. Not all of the Supreme Court's constitutional decisions are as easy to explain as this one, or as crystal-clear in meaning and in motive. But none of those decisions can be explained or analyzed or understood on any other than a sheerly superficial, legalistic level, except in terms of the Justices, the *men* who made them."

Thus to assume that the views of a lawyer in general practice are identical with those of his client may be a grave mistake. Such a lawyer, with every opportunity to familiarize himself with his client's point of view, may well be highly critical of it and may use his influence to change it. Professor Rodell's reference to Mr. Justice Roberts leads the reviewer to recall another Philadelphia lawyer, the late John G. Johnson, who never hesitated to rebuke even a most important client when he believed him wrong. The same thing is true of Roberts—when in active practice he often dominated the client but no client ever dominated him. Professor Rodell further fails to take account

of the large number of instances in which a lawyer, upon elevation to the Bench, followed a course totally different from that which the appointing President had expected. Chief Justice Stone and Justices Holmes, Frankfurter and Reed as illustrations of such a possibility are elsewhere (page 9) cited by Professor Rodell himself.

The foregoing quotation, however, has been made not to take issue with its content but merely as an instance typical of Professor Rodell's habit of thought. In the same way the several chapter-headings of his book may serve to indicate to what extent it is a history of an institution as distinguished from a criticism of the men who now compose the Court. The nine chapters are entitled as follows: "Powerful, Irresponsible, and Human", "From the Gleam in the Founding Fathers' Eyes to the Birth of Supreme Court Power", "Government by John Marshall, the Great Chief Justice", "Not States Against Nation but South Against North as the Court Leads on to War", "The Court Rides Back to Power on the Nation's Surge to the West", "Associate Justice Holmes, Dissenting". "The Court Collides with the New Deal and Wins the Battle by Defaulting the War", "A Court Attuned to a Liberal Key Develops Its Own Discordance", "Yesterday's Court, the Court Today, and a Court That Could Be Tomorrow". The criticism which these chapters contain is almost always destructive and in some instances vitriolic. This term may fairly be applied to the author's attack upon the exercise by the Court of what he regards as the non-existent power of "judicial review". The reviewer may be permitted to observe that the existence or non-existence of this power appears to be a matter of original apprehension. Professor Rodell looks for it among specified powers and, not finding it, concludes that it does not exist. On the other hand, what he could find (Article III; sections 1 and 2) is a grant to the federal courts of the Judicial Power of the United States—a power expressly stated to extend to "the laws of the United States". If a given statute is asserted to be such a law, it is unthinkable that the judicial power should not extend to a determination whether or not it is what it purports to be.

If the author's criticisms are to be regarded as for the most part destructive, the reader will hopefully look to the final chapter to find the author's formula for constructive judicial reform. In this chapter he will find the formula he seeks but its content may disappoint him. In substance it is the expression of a hope that Chief Justice Warren and Mr. Justice Harlan may yet come to see eye to eye with the two Justices on the Court—Justices Douglas and Black—with whom Professor Rodell is in wholehearted agreement.

The reader will find himself speculating whether Professor Rodell seeks to realize his hope for the future by persuasion or by sheer terrorization. His obvious earnestness and sincerity and the dignity of the academic position he holds favor the former alternative. On the other hand, the author's brutal frankness and his unsparing denunciation of named individuals may be deemed inconsistent with a purely educational aim. Men of sensitive mold might well be influenced in their official action by considering what type of public criticism they will be incurring if they disappoint their critic. It is, however, so obvious that neither the Chief Justice nor Mr. Justice Harlan is gun-shy that Professor Rodell would recognize it as useless to attempt to intimidate them.

Whatever motive may have led Professor Rodell to write this book, and even if he does not expect it to be read by lawyers, he has certainly rendered a notable service to the profession.

He has done this by making it clear that in his opinion those who agree with him are fundamentally distrustful of the intellectual honesty of those from whom they differ. By so doing he promotes clear thinking by making it evident that if his diagnosis is correct, judicial harmony is attainable only when reciprocal confidence takes the place of mutual distrust.

There remains, however, the hopeful possibility that his diagnosis is mistaken and that the Justices themselves recognize that no moral issue is involved but only such intellectual differences as can co-exist without endangering the usefulness of the Court.

GEORGE WHARTON PEPPER
Philadelphia, Pennsylvania

FEDERAL TAX PRACTICE. *By Laurence F. Casey. Chicago: Callaghan & Company. 1955. Four Volumes. $80.00. Pages xlix, 1902.*

There are two federal tax jungles —the substantive one of determining tax liability and the adjective one of tax procedures. In each of these there are large areas which are unsafe to enter without an experienced guide; even with a guide, the traveler must know how to help himself, and in many of the places even experienced guides must acknowledge uncertainty. This treatise is a guide to the adjective jungle.

It covers a wide range of civil procedural topics at the administrative stages and at litigation stages—as well as some topics in the twilight zone between adjective and substantive. It has an up-to-date view, which is needed in view of the 1952 reorganization of the Internal Revenue Service and the 1954 rewriting of the Code. The fact that the author has occasion to cite nearly 4,500 court decisions, many of them recent, reminds us that the number of possible points of controversy is great. In addition to these, there are many procedural questions which are not in controversy, but which are difficult for a lawyer to find the right answer to; the answer has to be found by searching among a variety of laws, regulations and procedures determined by bureau custom.

Among the matters dealt with in detail are the present administrative

organization; normal and summary assessment procedures; methods of audit and settlement at primary and appellate levels; the limitation provisions which operate in the taxpayer's favor and the ones which operate in the Government's; interest accruing to and against taxpayers; administrative refunds and credits; suits for refund; extensions for payment; levy and distraint; the effects of bankruptcy and receivership; Tax Court procedure; problems which arise in civil fraud cases, including those involving the Government's special methods of proof based on "normal mark-up" or "net worth increase"; and review of Tax Court decisions in appellate courts.

Lawyers with substantial experience in dealing with the Internal Revenue Service, as well as other lawyers, will find worthwhile matter in the author's analysis with respect to the foregoing subjects, including special points as to such topics as transferee liabilities, priorities and liens, civil fraud proceedings, valuation, the content and amendment of refund claims and burden of proof in the Tax Court.

There is included a wide selection of the forms which have been prescribed for use at the administrative stage, and the discussion of each topic is keyed to the forms that go with it. There are also, from Tax Court records, some seventy examples of actual pleadings, motions and orders, including appeal papers seeking review of the Tax Court's decisions. These Tax Court papers show the way in which various practitioners, many of them distinguished in the tax field, have dealt with specific problems. Among the examples are pleadings and motions relating to income realization, disallowed deductions, valuation, and civil fraud cases. There are also examples concerned with less commonly encountered matters such as perpetuation of testimony, motions for review by the Court, and various motions having to do with the so-called Rule 50, as to computation of tax after a decision of the Tax Court.

Especially at an administrative stage, success may depend on knowing how and when to proceed. Helpful as good textbooks are, it remains true that the lawyer is by no means through with his preparation on a procedural problem even if he has studied everything that is printed about it, including the textbooks. After that, it is important in many situations involving dealings with administrative authorities, to determine who is the one person in the Service—whether stationed in Washington or elsewhere—who knows most about the special point involved, and after talking with him arrive at an answer to this question: Will the plan that seems right to me also seem right to the Service? Bureaus develop, without publishing, many special ways of doing things—often well founded, sometimes not. Knowing either what difficulties are ahead on this account, or what difficulties can be avoided by conformity to the Service's habits of dealing, the lawyer can plan accordingly.

This work, having the flavor of experience as well as of analysis and of study, and not failing to give the author's own views as to doubtful points, ably carries out the author's stated design—"to conserve the practitioner's time by correlating in one place the statutory and case law together with rules of practice (and illustrative forms) that may affect the presentation of a federal tax case".

Without taking away an ounce of the credit which is due the author for achieving an excellent treatise, it can be said that the price charged by the publisher—$80.00—seems high for four volumes averaging about five hundred pages each.

ROBERT N. MILLER
Washington, D. C.

THE WOMAN IN THE CASE, *By Edgar Lustgarten. Great Britain: Charles Scribner's Sons, 1955. $3.00. Pages 218.*

The book purports to examine in four famous murder cases, the feminine mentality from the viewpoint of admissible evidence and to critically review the operations of the courts in which the cases were tried.

In the first case a wife who was equally unrestrained with sex and alcohol was charged with the murder of her husband. The second concerns a young woman who gave false testimony as the principal witness under circumstances of official corruption. In the third case a mentally deficient wife was the victim and in the last case a young woman was charged with the poison death of a lover who was about to expose her to her betrothed.

The author presents the psychology of the four women as separate studies and does so with the penetrating precision of a capable lawyer and the dramatic skill of a fine novelist. His analysis of evidence and the handling of the cases by the defense and prosecuting attorneys is done with finesse and logic.

Medical testimony, cross-examination of witnesses and the attitude toward and handling of the cases by the judges is given detailed scrutiny and criticism. The author's treatment of the four cases shows the keen perception and deep logic of a brilliant mind.

Lawyers will find the book to be interesting and entertaining but of little value otherwise.

The psychological observations of the author are weakened by the absence of expert psychiatric testimony. He fails to substantiate his own observations and conclusions as to motivations and it is dangerous to abstract particular mental faculties. The author has however made a valiant attempt and would appear to be saying that while crime, as a rule, yields many of its secrets to pure logic, you can throw logic out the window when factors involving the psychology of a woman enter the case.

STANLEY J. TRACY
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THE UNTOLD STORY OF DOUGLAS MacARTHUR. *By Frazier Hunt. New York: The Devin-Adair Company. 1954. $5.00. Pages 533.*

Whether one is an advocate or an opponent of the military and political philosophy of General Douglas MacArthur, one is compelled to admit that he is among the most forceful and striking personalities of our generation. In some he has inspired intense loyalty and devotion; others have reacted to him with a violence seldom equalled in the case of even the most controversial public figures; but none can deny that he has left his mark upon his times, and that rightly or wrongly he has adhered to the standards and principles which he conceived to be dictated by circumstance with an undeviating courage and tenacity. If he was right, history will justify him. If he was wrong, at least he was magnificently wrong.

Frazier Hunt is obviously one of his most ardent admirers. A newspaper man whose assignments have frequently brought him into first hand contact with the subject of his biography, he early conceived a respect for him which subsequently developed into something little short of idolatry. The story which he tells is from beginning to end one of conflict and opposition. From the early days at West Point, where the hazing to which he was subjected was so severe as to figure prominently in a special court of inquiry, to the Korean campaign, which Mr. Hunt characterizes as "a war which he was not permitted to win", the tale is one of frustration, organized resistance in high quarters, and accomplishment achieved only against overwhelming odds. Only by indomitable courage and uncompromising integrity was MacArthur, according to Mr. Hunt, able to prevent our country and the world from reaping to the full the harvest of the blunders and stupidity resulting from the conniving of those whom the fortunes of politics placed in a position to countervail his far-seeing wisdom.

This is all very well if you are as sympathetic to MacArthur's cause as Mr. Hunt obviously is. All that the President and the Chief of Staff had to do, assuming that their foresight was equivalent in clairvoyance to Mr. Hunt's hindsight, was to acceed to MacArthur's suggestions in every instance. Had they done so, not only would World War II have been over in a fraction of the time, but with only a tithe of the cost in men and materiel. For the greater part of the losses actually incurred in both of these respects, according to Mr. Hunt, stemmed from failure to support MacArthur properly in the series of brilliant military operations which he staged in the Pacific and from efforts to divert public attention to the European Theater so as to relegate him to a secondary position. In other words, and Mr. Hunt is explicit in this, our leaders were subverting the war effort in order to suppress MacArthur politically.

This is a little difficult to accept. Not that Roosevelt and Marshall were infallible; far from it. Time has revealed many ragged gaps in the fabric of their planning, and Roosevelt at least was not above maneuvering matters to his political advantage. But it is incredible that throughout the long period when they were at cross-purposes with MacArthur, they were invariably in the wrong and he was with equal consistency in the right. In fact, the picture which Mr. Hunt presents is of a man who, throughout a career of seventy-five years, has never made a mistake, never made a false evaluation, never acted except from the highest principles and the best motives. Such a man should not only be supported; he should be deified.

There are, in fact, only two variations of the pattern which Mr. Hunt recognizes. One is the situation where MacArthur was permitted to do (or did, regardless of instructions) what he believed to be desirable under the circumstances. Here the outcome is always propitious. The other is where he has been prevented from doing what he thought best, or required to follow some other course of action. Here the result has always been unfortunate, and it has later developed that MacArthur's plan would have accomplished the desired end. Therefore it follows that had he always been permitted to follow his own inclinations, the outcome would have been invariably fortuitous. *Quod erat demonstrandum.*

But we must at least be permitted to suspect that in some instances Mr. Hunt has reasoned from conclusion back to premise, rather than from premise to conclusion. In other words, wherever things have worked out well, he has assumed that MacArthur must have been given a free hand, while when they have worked out badly, he has assumed interference. As an example, take Mr. Hunt's treatment of the Korean campaign. Naturally, he is convinced that had MacArthur not been prevented from operating north of the thirty-eighth parallel, it would have resulted in a decisive victory which would not only have avoided much loss of life and property but would have forestalled the long and costly "cold war" which followed and reduced the consequent risk of a third world war. Certainly there are many who agree with him. But Mr. Hunt goes further, and argues that MacArthur's superiors had no *right* to order him not to cross the forbidden line. This he does on quasi-legal principles, saying:

"The theory of hot pursuit is based on an ancient doctrine of criminal law that permits a peace officer who is closely pursuing a felon to cross beyond the area of his jurisdiction in order to capture the criminal. The granting of immunity from pursuit to Communist planes attacking U.N. Air Forces inside North Korea was in direct opposition to this old and accepted doctrine of criminal and international law."

The wisdom of placing limitations upon MacArthur's right of pursuit may be open to question; but to suggest, as Mr. Hunt does, that the limitations imposed were illegal becomes somewhat ludicrous. Carrying the analogy forward, to say that

under certain circumstances a constable may pursue a criminal beyond the limits of his bailiwick without waiting for authority to do so is quite different from saying that where he has been affirmatively instructed by the sheriff, the authority from which he derives his power to act at all, not to exceed certain bounds, he may nevertheless transcend those bounds in his sole discretion should he elect to do so, on the ground that the implementing authority has no power of limitation. And so when MacArthur reacted to the restriction placed upon him with his famous "There is no substitute for victory" remark, it must in fairness be conceded that the only possible course which the President had was to relieve him of his command. For whatever else he may have been, he was certainly insubordinate; and there is no place in the military hierarchy for insubordination. His only justification was that he was in the right, which perhaps he was; but then perhaps he should have been President, a thought which apparently also occurred to him from time to time.

These are matters which will no doubt be argued pro and con for many years to come. They are questions of the utmost importance to all of us, which can ultimately be resolved only at the bar of history. Mr. Hunt has performed the function of an advocate in presenting one side of the controversy, and his presentation is interesting, persuasive and well reasoned. But as biography it lacks the impartiality and the perspective which are so necessary to make the subject stand before us in the round, viewed equally from all sides. Instead it creates a suspicion that what he describes as self-confidence might, when viewed from a different vantage point, prove to be arrogance; that singleness of purpose might be only another name for stubbornness; and that individuality sometimes develops the attributes of showmanship. It is a book which should be read, and which can be read not only with pleasure, but with a sort of fascination. But it is not a book which can or should be accepted, not at least without the application of a corrective, or perhaps a counter-irritant. I would suggest a parallel reading of Plutarch's life of Alexander the Great. There are points of similarity, and not all of them in the field of military prowess.

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THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT. *By Gregory Zilboorg, M.D. New York: Harcourt Brace and Company. 1954. $3.50. Pages 136.*

The author tackles a subject that has long needed the analytical approach. He presents the viewpoint of the psychiatrist with clarity and preciseness, and with a most refreshing frankness. The book merits reading by judges, prosecutors, attorneys, probation, detention, parole and other officers having an interest in criminal justice.

The opening chapter deals with "the nature and the quality of the Act" as expressed in the *McNaghten* rule, which the author states "seems to be the best and thus far the most stable expression of our medico-juridical confusion". As to the meaning of "nature" and "quality", the author claims these words have no meaning whatsoever unless we bring them into harmony with the total personality of the criminal (page 26). The subject is handled expertly; however, many lawyers will question the pertinency of some of the examples and the sources of some of the assumptions.

The deterrent effect of punishment as discussed in the second chapter is interesting and penetrating. Areas where the psychiatrist can and should be used are outlined. In the only recent case cited by the author in this chapter, *Time* is cited as an authority instead of the transcript of the trial or other official sources.

In chapter three the author points out some differences in professional psychology and in effect is asking the legal profession to accept the psychiatrist on "faith". The legal profession is bluntly criticized to the extent that, in the opinion of this reviewer, the author seriously weakens his position.

A strong case is made for extensive and adequate research. When the author discusses aggression and transgression, and states on page 51, "the mysterious thing about the whole matter is that there seems to be as yet no satisfactory explanation of why certain individuals start *acting out* [author's italics] their fantasy life either in the form of annoying neurotic social behavior, or in the form of criminal acts. Psychoanalysis has uncovered a wealth of clinical data enriching our understanding of the deeper psychology of the normal, the neurotic, and the psychotic, whether he be criminal or not. But it has no answer as to what it is that makes man succumb or give in to his fantasies so that they become criminal acts."

In discussing some sources of the drive to punish, the author lays emphasis on the "aggressive, punitive impulses of the agencies of justice rather than on the purely metaphysical philosophy of just punishment". He neglects to discuss the rehabilitation impulse, this being dismissed rather casually, early in the book, with a reform reference.

It is a challenging and provocative book and will prove to be the source of much argument between the medical and legal professions. Lawyers will not accept many of the assumptions and conclusions of the author, particularly as to motivation.

The recent case of *Durham* v. *United States,* 214 F. 2d 862 (D. C. Cir., decided July 1, 1954) is a step in the direction of the author's views. Those who read the book should also refer to the *Durham* case because the court discarded the "right-wrong" test and the "irresistible impulse" test concerning which the author says on page 16: "This is mistakenly and wrongfully known as the 'right and wrong' test. . . . It is

not a test, actually; it is a demand based upon an artificial definition of a nonexistent condition called 'legal insanity'." A discussion of this case by the author would have made an excellent addition to the book. The book was published in 1954, therefore it is obvious that the *Durham* decision was not available to the author.

This book is a milestone in the conflict which exists between law and psychiatry. While it will not be accepted in its entirety by lawyers, it is a move in the right direction; *i.e.*, the bringing of the psychiatrist and the lawyer into closer proximity.

STANLEY J. TRACY
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THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW. *By Edward S. Corwin. Ithaca, New York: Great Seal Books, A Division of Cornell University Press. 1955. 95 Cents. Pages 89.*

Cornell University Press through its Great Seal Book paper covered edition has rendered a service to those interested in the subject of natural law by offering in this handy volume a reprint of Professor Corwin's well-known *Harvard Law Review* articles, which originally appeared in the years 1928 and 1929. Clinton Rossiter rightly observes in the introduction that this essay is "a model of Professor Corwin's scholarship" and "an eloquent introduction to the idea of the Constitution as Higher Law". He adds a brief biographical note about the author which reveals that since his retirement from Princeton in 1946, he has been "toiling as faithfully and productively as ever in the lush vineyards of the American Constitution".

The pages of the JOURNAL have been provocatively provided with articles and letters over the years on many phases of natural law doctrine, as was evidenced by the outbursts pro and con that greeted Professor Goble's recent "Nature, Man and Law". Even as in the case of the famous thirteen Pragmatisms, made famous by Professor Lovejoy, one suspects from all these vehement viewpoints on natural law, a profusion of fifty-seven varieties of natural law doctrine running the gamut from the absolutistic to the relative and from the imposing and eternally binding to the suggestive and stimulating ideal of the "ought" as contrasted with the "is" in the law.

It is a treat in all this turbulence to be able to take a refreshing pause to read (or reread) a simple, forthright factual account of the sources of "Higher Law" doctrine in the minds of our Founding Fathers as furnished us by Professor Corwin. He shows where the idea came from, how it survived various transformations and what special forms of it are of significance to our constitutional history. We read of Demosthenes, Aristotle and Cicero among others of the ancients and the modifications of their doctrines at the hands of the medieval thinkers. We then are furnished with an interesting survey of the notion in English history from Bracton to Blackstone. Fortescue and Coke reveal the principal background along with Magna Charta for later seventeenth and eighteenth century speculation, particularly for the Deistic phases. Locke's views are then summarized as the major, though not exclusive medium, for the conveyance of natural law ideas into American constitutional theory. Corwin makes the interesting passing observation that, contrary to general realization, the views of Hobbes are complementary rather than contradictory to those of Locke. The ideas of the latter are particularly marked in the stirring words of Otis and the famous Massachusetts Circular Letter of 1768 indicates a blend of Coke and Locke.

Corwin shows that all of this reliance on natural law doctrine did not pass unopposed among our early leaders, a fact emphasized and elaborated upon in the later work on the subject by Cornelia Le Boutillier on *American Democracy and Natural Law.*

The author concludes with a note on the place of Blackstone as the chief vehicle for the doctrine on this side of the Atlantic as 2500 copies of the *Commentaries* were sold here before our Revolution. Of him, Corwin remarks significantly, "Eloquent, suave, undismayed in the presence of the palpable contradictions in his pages, adept in insinuating new points of view without unnecessarily disturbing old ones, he is the very exemplar and model of legalistic and judicial obscurantism."

Corwin finds that the notion of a "Higher Law" had become "invested with statutory form" in our Constitution and "implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian."

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THE FIFTH AMENDMENT TODAY. *By Erwin N. Griswold. Cambridge, Massachusetts: Harvard University Press. 1955. $.50. Pages 82.*

The contents of this booklet consist of three speeches delivered by the respected Dean of Harvard Law School. Their subject concerns principally the predicament of college teachers who are called before legislative investigative committees to answer questions with respect to present or past communist affiliations. In February of this year The Fund for the Republic mailed complimentary copies of the booklet to large sections of the public, including, at least, members of some, if not all, bar associations and law school faculties. Judge Bazelon quotes from the book in his dissenting opinion in *Communist Party of U.S.* v. *Subversive Activities Control Board,* 223 F. 2d 531. The importance which the book is assuming, therefore, justifies some comment and analysis.

Dean Griswold's views are presented in a reasoned and objective manner. They are well worth the consideration of anyone interested in the subject matter, especially his suggestions regarding a proper Code

of Practice for legislative investigations. However I respectfully dissent when he apparently defends the propriety as well as the constitutional right of an innocent man who pleads the Fifth Amendment in refusing to answer questions relating to communist activities. If, as Dean Griswold suggests, "our teacher magnifies his predicament" to the point that he is really fearful of prosecution, it does his common sense as little credit as did his initial attachment to the communist cause. Nevertheless we do not take issue with Dean Griswold on the proposition that even an innocent man may sometimes be entitled under the Constitution to invoke the Fifth Amendment without risking prosecution in contempt proceedings.

We do disagree when Dean Griswold presses the point that inference of wrongdoing is not warranted from a witness's refusal to answer under the Fifth Amendment. He concedes the propriety of dismissing a bank teller who refuses to answer when asked whether he is the person who stole the missing thousand dollars. But, he suggests, "the closer the question asked gets to the area of opinion and political belief, the less significant . . . is the refusal to answer the questions." Of course, the purely subjective state of a witness's mind is scarcely a proper subject for persistent inquiry. Yet if a man frequents the company of Communists, or habitually expresses opinions hewing to the communist line, ancient wisdom and common sense alike would accept such facts as grounds to suspect his affiliation with the conspiracy. Seneca, I believe, was the Roman who said, *Grex cum gregibus congregant,* or as we would put it, "Birds of a feather flock together." To pass final judgment on the man on the basis of such suspicion alone would manifestly be unfair. Fairness is served by affording the man an opportunity to explain and defend his position at a hearing. But if under such circumstances he refuses to answer all pertinent questions and invokes his privilege against self-incrimination, he can scarcely avoid the risk of adverse inference. There is no very persuasive reason why he should have any super-immunity from adverse inferences, simply because his previous ambiguous activities consisted largely of political activities or public expressions of opinion.

The facts are that Congress—and most people in this country—reasonably believe or suspect that the communist command has in the past planted secret cells in key areas, for example government and schools; that at least some of these cell members were knowing conspirators dedicated to the secret subversion or overthrow of the government; and that these cells were used to some degree to promote the communist conspiracy. It certainly is not improbable that the communist command is continuing its efforts to protect and maintain such cells as still remain in existence, and to establish new ones. With this in mind it seems unreasonable to deny the propriety of a legislative investigation to try to determine the actual existence of the cells, the identity and motivation of their members, their techniques and accomplishments, and, generally, the circumstances which either aided or impeded their activities. Dean Griswold cites charges in this connection that fear and hatred are being fanned to a white heat. Doubtless extremists on both sides have done a bit of fanning, but we should remember that exaggeration of fear and hate is standard operating procedure in American politics. Among anti-Communists not professionally connected with the controversy I have discerned little evidence of notable hatred or terror. Most people would concede the honorable intentions of a majority of the early fellow travelers who fit into the case types described by Dean Griswold. At most the public distaste for such men involves belittlement (occasionally a mild degree of contempt) for their past bad judgment and lack of practical intelligence. This ranges to tolerance and even sympathy for those who frankly seek to make amends for previous indiscretions, and to disgust and suspicion for those who steadfastly refuse to testify or co-operate in any legislative investigation. Even in the last situation the distaste seldom seems to rise to "hatred" unless in cases where particular circumstances heighten the suspicion of conspiratorial wrongdoing. Public repugnance is fed by the witness's present attitude of intransigence rather than by his past indiscretions.

One may well question whether the "idealist" ex-Communist who claims the Fifth Amendment privilege really fears criminal prosecution or penalties for his indiscretions. I suspect his self-righteous indignation may stem rather from a sense of injustice at being subject to any blame or criticism whatsoever. He resents the role of dupe almost as much as that of traitor and smarts as much or more at reflections on his intelligence as at slurs on his honor —possibly because his intelligence is more in issue. Dean Griswold offers a mild defense of the dupe on this score by remarking: the conclusion that "the dupe must have been naive or lacking in intelligence . . . rests on a large amount of hindsight. A man's actions at any time should be evaluated on the basis of the facts then available to him, and the state of his own mind—on the basis of what he actually knows, and not by facts we learn later that were not known to him." Unfortunately it takes but little outside encouragement to confirm some of these men in their intransigence. Communism probably attracted many in the first instance because they fancied themselves in a crusading role. With that vision faded, they slip readily into the character of champion and martyr in the cause of free speech and academic freedom. It affords escape for their wounded self-esteem.

I agree with Dean Griswold that one must allow for the points of difference in each individual case. In general, however, I suggest that the principal factor which contributed and is still contributing to the communist duping of honest men, particularly of the intellectual class,

is the conviction or conjecture that *the wave length of the future is somehow keyed to state socialism or collectivism as the ultimate program of social reform*. Under the spell of this mystique it was easy for otherwise intelligent men to shrug off brutal facts (commonly known even in the 30's) as accidental and temporary, and in no way attributable to Communism as a system. "You can't make an omelet without breaking eggs," ran the cliché of those days. The doctrine's appeal even today helps us understand the vagaries of the Bevanites, the Titoists, the Nehruites and the Fabians both abroad and in our own midst. It may contribute also to the resentment felt in some quarters at any disparagement of the common sense of the Communist dupes as such.

In accusing any considerable group of intellectuals of lack of common sense, one risks the countercharge of Babbittry. I nevertheless venture to suggest that there is no great correlation between intellectuality and common sense. The first features considerable specialized knowledge, a lively mind and an articulateness sometimes prone to imaginative constructs of ideal man and ideal society. Common sense, on the other hand, is marked by a continuing awareness of simple, ordinary things involved in the actual relationships of everyday group living; it takes account of the intrinsic imperfections of man and society in reality. Many men are intellectual and, coincidentally, are men of common sense as well, but the point I would make is that common sense is not required in a man to qualify him as an effective, and sometimes very useful, intellectual. In some positions to which intellectuals gravitate by natural selection—*e.g.*, university, research and writing posts—lack of common sense is not so certain to lead to ultimate disaster as one would expect in the exercise of authority in business, or government or the handling of foreign affairs. Consequently to charge an ex-Communist dupe with deficient common sense is not the same as to deny his competence as a college teacher or a research expert.

On the contrary, however, when such a dupe compounds his folly by invoking his privilege against self-incrimination and refusing to answer questions in a proper legislative investigation, the most charitable thing that can be said of him is that he has an extremely poor concept of civic and political responsibility. It seems reasonable to conclude that this fact alone may unfit the man for any position calling for objectively high standards of citizenship. This would include, among others, any responsible position in government or in teaching the young. This conclusion, apparently, is not in accord with Dean Griswold's view.

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Views of Our Readers

(Continued from page 1103)

back that they were not successful, then one of the parties gets a divorce. I do not think that the General Assembly of any state will pass such a statute. Despite all the talk about "coming to court not to fight but for help", marriages should not be lightly dissolved, unless there is some kind of guilt—this principle has worked for a longer period of time than marriage licenses have been in existence. The next logical step will be to ask that adultery be abolished as a ground for divorce among people of procreative age. The law must deal with occurrences and circumstances; and perhaps it is better to put it on the ground of fault rather than basing it on light and trivial reasons. Few lawyers are ready to leave these matters to a judge—they want the grounds specifically spelled out in the statute.

In many of these movements the proponents are merely trying to help the undeserving to make a bad divorce decree good. I think Mr. Justice Frankfurter put the matter very neatly when he said in his dissenting opinion in the *Sherrer* case that we should think "quantitatively, not dramatically"; he then goes on and says "The proportion of divorced people who have cause to worry is small indeed. Those who were divorced at home have no problem. Those whose desire to be rid of a spouse coincided with an unrelated shift of domicile will hardly be suspect where, as is usually true, the State to which they moved did not afford easy divorces or required a long residence period."

Actually there are but five states, Arkansas, Florida, Idaho, Nevada and Wyoming, in which divorce may be obtained on less than one year's residence. These five states accounted for only 24,370 divorces in 1940, only 9 per cent of the national total (See Department of Commerce: *Statistical Abstract of the U.S. 1946* page 94). The number of divorces granted in Arkansas, Idaho and Wyoming is small enough to indicate normal incidence of divorces among their permanent population with only few transients taking advantage of their divorce laws. Thus Nevada and Florida attract virtually all of the non-resident divorce business. Yet between them only 16,375 were reported in 1940, only 6 per cent of the total.

Thus the only persons insecure are that small minority who temporarily left their home states for a state—one of the few—offering quick and easy divorce, obtained one and departed. "Is their security so important to the Nation", asks Mr. Justice Frankfurter, "that we must safeguard it even at the price of depriving the great majority of States which do not offer bargain divorces of the right to determine the laws of domestic relations applicable to their citizens?"

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What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

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Attorneys . . . *disbarment*

■ In a case attracting wide national attention, the Supreme Court of Florida has ruled that an attorney should not be disbarred because of his refusal on constitutional grounds to answer whether he is a past or present member of the Communist Party. The American Bar Association, The Florida Bar and the National Lawyers Guild appeared in the case as *amici curiae*.

The attorney appeared before a Senate subcommittee in New Orleans in 1954 and refused to answer questions relating to his alleged membership in the Communist Party and other subversive organizations. He based his declination on the Fifth and First Amendments. He had similarly performed before a Florida grand jury. The disbarment proceeding in Florida, one of the three states in which the attorney is admitted, was then commenced.

At a hearing on the motion, the judge asked the attorney two questions: "Have you ever been a member of the Communist Party?" and "Are you now a member of the Communist Party?" Again there was a refusal to answer, based on federal and state constitutional rights against self-incrimination.

This was enough for the hearing judge. He said the attorney had a constitutional right to refuse to testify but that he didn't have a constitutional right to practice law. A disbarment order was entered.

Reversing, the Supreme Court declared that it could see no warrant for applying a distinction between the right of an individual and the right of a lawyer to invoke the Fifth Amendment. The Court asserted that "one's privilege to practice law may be made to depend on a very tenuous thread" if a court could hold that an attorney's refusal to answer, supported only by evidence taken outside the court and inferences from that evidence, was sufficient to disbar.

"We agree," the Court said, "that no lawyer trained and educated in the democratic tradition can become a member of the Communist Party or other subversive organization without forfeiting his privilege to practice law. To subscribe to the oath required for admission to the bar and then affiliate with an organization whose avowed purpose is to overthrow all free governments by force is so inconsistent that the two philosophies cannot exist under the same skin."

But the crux of the case, the Court continued, was not the attorney's refusal to answer, because no inference of guilt could be indulged from that, but whether he was in fact a member of the Communist Party. On this point, the Court ruled that the attorney was entitled to due process: competent proof in open court with the right of confrontation and cross-examination. And the Court found that there was no such proof before the hearing judge.

"Depriving one of the right to practice law is the superlative stain that may be stamped on his character and when a square issue on that point is made by the pleadings, the state should come forward with proof adequate to support the charge", the Court declared. "There may be circumstances under which claiming the privilege against self-incrimination would be cause for discipline or even disbarment, but they should be demonstrated by adequate proof. To do less would amount to the application of totalitarian methods to the enforcement of democratic precepts. It would deny one due process."

The Court reversed the disbarment order and remanded the case with directions to proceed to proof.

Two justices concurred specially, one dissented and two did not participate, making the decision four-to-one. The concurrers, speaking more strongly then the major opinion, declared the rule of the hearing judge would make attorneys "secondary citizens" as to constitutional rights. The dissenter said the only proof needed for disbarment was the refusal to answer itself. To him, the refusal to answer proved culpability.

(*Sheiner* v. *Florida*, Supreme Court of Florida, July 29, 1955, Terrell, J.)

Constitutional Law . . . *pay while voting*

■ The Supreme Court of Illinois, refusing to budge from a position taken in 1923, has ruled unconstitutional legislation requiring employers to pay their employees for time off to vote.

The statute provided that an employee might have, upon previous application, two hours off during the time polls are open to vote, and that "such voter shall not because of

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

so absenting himself be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages". The statute made a violation a finable misdemeanor.

The case did not arise as a criminal action, but as a civil suit by employees who had been granted time off to vote but were attempting to collect time-off wages denied them by the employer.

Conceding judicial approval of similar statutes in other jurisdictions, the Court said that what was due process in one state was not necessarily that in another. It held that while the time-off provision was unassailable, the requirement of pay for that time violated the employer's constitutional right to equal protection of the law and was the taking of property without due process.

The Court could find no basis for the pay-while-voting feature of the law in the police power. While the public welfare is served by voting, the Court said, there was no assurance in the legislation that the excused employee would in fact vote. Neither, the Court continued, did it square with equal protection theories to place the financial burden of getting out the vote on one group, while self-employed and professional people used their own time to vote. The Court doubted, moreover, that the statute actually accomplished its purpose. "The only direct result of the pay-while-voting legislation," the Court remarked, "is that the employer loses wages and production, and the employee may or may not vote."

Referring to its 1923 decision in which similar legislation was overturned, the Court declared that modern transportation facilities have diminished even more the need for legislative regulation. It concluded: "If it is still deemed a necessary incentive that employees be paid for voting, we think it is a matter to be settled by private agreement rather than by penal legislation which burdens and benefits but a few of those in the community who are affected."

(*Heimgaertner* v. *Benjamin Electric Manufacturing Company*, Supreme Court of Illinois, May 20, 1955, rehearing denied September 19, 1955, Daily, J., 128 N.E. 2d 691.)

Corporations . . . *book value*

■ In construing a survivorship stock purchase agreement, the Court of Appeals of New York has re-examined the concept of book value of equity shares.

Two persons owned the entire stock of a corporation. They had agreed in writing that the stock of the first to die should be sold to the survivor "at the book value thereof . . . [as] determined by the most recent audit of the books of the corporation. . . ." After the death of one of the stockholders, a mid-year audit used to determine the value of the decedent's holding showed a net profit, but noted that it was subject to federal and state income taxes.

The decedent's personal representatives claimed that since income taxes were not due and payable at the time of death, the book value of the stock should be computed without reference to income tax. But the surviving stockholder contended that income tax liability should be considered ratably in determining book value.

The Court agreed with the surviving stockholder. It asserted that sound accounting practice required that each dollar of income should bear its proportionate share of the income tax liability for the year. "The mere fact that an item is not yet legally due and payable does not mean that it may be ignored as a liability," the Court declared.

(*Aron* v. *Gillman*, Court of Appeals of New York, July 8, 1955, Froessel, J., 309 N.Y. 157, 128 N.E. 2d 284.)

Courts . . . *jurisdiction*

■ A federal district court should not decline jurisdiction on the ground that the same suit might be brought in a state court whose judges are elected rather than appointed, and thus presumably more responsive to the public, according to a decision of the Court of Appeals for the Ninth Circuit.

The case was a class action under the Federal Civil Rights Act, commenced in the United States District Court for the Southern District of California by a group of Mexicans and Negroes. There was an allegation of segregation in public school facilities on the basis of race and color. There was no constitutional issue involved, since California law prohibits segregation, and the district court refused to consider the complaint.

The district judge had held that to assume federal jurisdiction "would be in effect to remove the conduct of the schools from locally elected representatives, removable by the local citizens if unsatisfactory, and put that conduct into the hands of the different judges in each federal judicial district, who are appointed for life by an appointing power not responsive to the will of the local citizens. . . ." Only when a federal constitutional question became inevitable to the decision, the judge said, should a federal court exercise its jurisdiction.

This position was rejected in short order by the Court of Appeals. It declared that one of the purposes of the Federal Civil Rights Act was to enable one claiming race or color discrimination to choose either a federal court, with an appointed judge, or a state court, with an elected judge.

The obvious purpose of the Act, the Court continued, was to give a litigant this choice. And where a federal court is presented properly with a case over which it has jurisdiction, the Court concluded, it has a duty to take jurisdiction.

(*Romero* v. *Weakley*, United States Court of Appeals for the Ninth Circuit, October 10, 1955, Denman, C.J.)

Hatch Act . . . *what is political*

■ An employee of the Atlanta Housing Authority has found that his candidacy for re-election to the Atlanta Board of Education in 1949 was partisan political activity prohibited by the Hatch Political Ac-

tivities Act, 5 U.S.C.A. § 118 (k). But while reaching this decision, the United States Civil Service Commission, finding the employee "a conscientious and valued public servant", also determined that it would not be in the public interest to order his removal.

In the election for school board members a ballot without party designation was used. Nominations, however, were made by an organization called the "City Democratic Executive Committee". But this was misleading, for Republicans served on the committee, and Republicans voted in the primary resulting from nominations of this group. It was also shown that neither the state nor national Democratic organizations had anything to do with the city committee.

But the fact of nomination by this group, the Commission held, meant that the candidate participated in a partisan political election. It rejected arguments that, while the primary was called a "Democratic primary", it was really non-partisan.

(*Matter of Cook*, United States Civil Service Commission, August 31, 1955, Docket No. 212.)

Mechanics' Liens . . . *when and on what*

■ Mechanics' lien statutes have been qualified in two recent cases.

The Superior Court of Delaware was faced with the problem of determining when a claim for the lien must be filed in connection with a multiple housing project. The state's statute requires the lienor to file his claim within ninety days of the completion of the labor performed.

The lienor contended that the statutory period began to run from the date of completion of his labor on the last of the houses in the project. But the Court ruled that the lien was individual as to each unit in the development and that to perfect a mechanics' lien, the lienor was required to file his claim within the statutory period from the date of completion of each separate unit.

(*Paladinetti* v. *Oak Lane Manor, Inc.*, Superior Court of Delaware, July 26, 1955, Hermann, J., 116 A. 2d 173.)

■ In the other case the Court of Appeals for the Tenth Circuit ruled that state mechanics' lien statutes cannot be employed to support an encumbrance on land allotted to Indians.

An Indian had contracted for the construction of a dwelling house on land held for him by the United States in trust. He had made full payment under the contract, but some sub-contractors remained unpaid.

The Court's decision was based on the theory that the imposition of a mechanics' lien on Indian trust lands would frustrate the declared policy of the United States.

(*U.S.* v. *Chinburg*, United States Court of Appeals for the Tenth Circuit, June 29, 1955, Phillips, C.J., 224 F. 2d 177.)

Negligence . . . *wrongful death*

■ An Illinois court has refused to deviate from the state's rule that a wrongful death action is barred by the contributory negligence of any of the next of kin. At the same time it also has declined to allow an unemancipated minor to sue his father in tort.

Two minors, both under seven and riding with their father, were involved in an automobile accident; one was killed and the other injured. The administrator of the deceased son's estate brought a wrongful death action, naming both the father and the other driver as defendants and charging negligence.

A next-friend suit was instituted by the injured son against the father and other driver. The complaint stated that the father had liability insurance coverage and that he had relinquished any right or benefit from any claim for damages made on behalf of the injured son.

Under these circumstances the plaintiff-administrator contended that the wrongful death suit should be permitted, with recovery, if any, to the innocent next of kin, and that the injured son should have an action against the father because the latter's waiver of interest in the recovery constituted an emancipation of the son.

But the Appellate Court of Illinois for the First District refused. While it conceded that the trend may be toward more liberal doctrines, it declared that Illinois's law was clear that the contributory negligence of one next of kin barred the action as to the innocent next of kin. The Court noted that this rule was based on the rationale that a wrongful death suit was a single cause of action and that there could be no separation of damages to be assessed by a jury. This, the Court said, was established public policy of the state and should be altered only by the legislature.

The Court also held that the existence of liability insurance, coupled with the father's waiver of any right to the injured son's recovery, did not work an emancipation entitling the son to maintain an action against the father. If there was any emancipation, the Court said, it was only partial and did not remove the common-law barrier to the suit.

(*Nudd* v. *Matsoukas*, Appellate Court of Illinois, First District, June 28, 1955, McCormick, J., 128 N.E. 2d 609.)

Trial Practice . . . *instructions*

■ In a newly-developing field of jury instruction law, the Court of Appeals of Ohio has held that a defendant is not entitled to an instruction that the plaintiff's personal injury recovery is free of federal income tax. Thus the Court has taken a position contra to that of the Appellate Court of Illinois in *Hall* v. *Chicago & Northwestern Railway Company*, 349 Ill. App. 175, 110 N.E. 2d 654, 39 A.B.A.J. 505, June, 1953.

The requested instruction, refused by the trial judge in an action under the Federal Employers' Liability Act, would have charged the jury that as a matter of law "any amount received by the plaintiff as compensation for personal injuries is exempt from federal income taxation, and you must take this fact in consideration in arriving at the amount of your verdict in this case".

The Court conceded that the in-

struction contained an accurate statement of tax law, but ruled that it was not "pertinent to one or more of the issues and applicable to evidence adduced", as required by Ohio law. The Court felt that to permit the instruction would require an inquiry into the amount awarded by the jury for loss of wages and future earnings and the amount allowed for pain and suffering, since the former would have been reduced by income taxes had the plaintiff not been injured and had continued to work. The Court said this would "so confuse the jury with technical tax questions as to defeat the purpose of a trial".

(*Maus* v. *New York, Chicago & St. Louis Railroad Company*, Court of Appeals of Ohio, Cuyahoga County, July 8, 1955, Hunsicker, J., 128 N.E. 2d 166.)

Workmen's compensation
recreational activities

■ In a case turning on the factual situation, the Supreme Court of Illinois has decided that an injury received by an employee in a voluntary company-league softball game is compensable under that state's workmen's compensation law. (For a digest of case in the lower court, see 40 A.B.A.J. 786, September, 1954.)

The claimant was employed by a grocery chain which sponsored a softball league composed of teams from all its stores. Participation was not required; games were played off company premises after working hours; no time off was given for either practice or games; no admission was charged to games.

The company supplied only a part of each player's equipment, but it placed its name on the T-shirts it furnished all players. It awarded trophies at an annual dinner meeting. It also disseminated information about the league and games in house organs and on its radio station. In the instant case another employee, appointed as team manager, had personally recruited participation of the claimant.

Viewing all this and sifting through a multitude of look-alike cases, the Court said the essential inquiry was whether the employer received a direct benefit from the recreational activity so that it could be considered an incident of employment. The Court concluded by regarding the improved employee morale generated by the softball league and the T-shirt advertising as sufficient to bring the injury within the scope of employment.

(*Jewel Tea Company, Inc.* v. *Industrial Commission*, Supreme Court of Illinois, May 20, 1955, rehearing denied September 19, 1955, Daily, J., 128 N.E. 2d 699.)

Zoning . . .
aesthetics and history

■ The Supreme Judicial Court of Massachusetts has given the green light to legislation designed to preserve the architectural and historical aura cast by Nantucket and Beacon Hill. In an *Opinion of the Justices*, the Court has found a police-power basis for the establishment of commissions to guard the architectural appeal of these areas.

In general the proposed legislation outlines boundaries of so-called historic districts and sets up commissions whose function is "to pass upon the appropriateness of exterior architectural features of buildings and structures hereafter to be erected, reconstructed, altered or restored. . . ." The commission is given power to issue permits for razing buildings. If a proposed building is found suitable under the purposes of the act, the commission issues a "certificate of appropriateness".

While the Court conceded that the legislation did not involve public health, safety or morals, it declared that it did relate to public welfare, and thus had a police-power bottom. Referring to cases holding that aesthetics alone cannot support zoning, the Court remarked: "There is reason to think that more weight might now be given to aesthetic considerations than was given to them a half century ago."

(*Opinion of the Justices to the Senate* (two cases), Supreme Judicial Court of Massachusetts, July 7, 1955, 128 N.E. 2d 557 and 563.)

What's Happened Since . . .

■ On October 10, 1955, the Supreme Court of the United States:

DENIED CERTIORARI in *Costello* v. *U.S.*, 222 F. 2d 656, 41 A.B.A.J. 649, July, 1955, leaving in effect the decision of the Court of Appeals for the Second Circuit affirming a fine levied by the district judge for contempt for refusal to answer certain questions at a pretrial deposition, the refusal being based on the Fifth Amendment.

■ On July 8, 1955, the Court of Appeals of New York (309 N.Y. 168, 128 N.E. 2d 291) affirmed the decision of the Appellate Division, Second Department, in *Rosenfeld* v. *Fairchild Engine and Airplane Corporation*, 132 N.Y.S. 2d 273, 40 A.B.A.J. 706, August, 1954, that in a proxy contest for control of a corporation it is proper for the corporation to pay the reasonable and proper expenses of the old management by action of the board of directors and of the new management by action of the board and approval of the stockholders. The Court's decision, dissented from by three members, warned, however, that the contest must be over policy, rather than being a "purely personal power contest", and that the expenditures would be subject to judicial scrutiny as to matters of propriety, good faith, private gain, reasonableness and the best interests of the corporation. In the case—a stockholder's derivative action—the plaintiff had not attacked specific expenditures and therefore the Court did not measure particular items against its standard. Speaking to the broad question raised by the case, the Court said: "In the event of a proxy contest, if the directors may not freely answer the challenges of outside groups and in good faith defend their actions with respect to corporate policy for the information of the stockholders, they and the corporation may be at the mercy of persons seeking to wrest control for their own purposes, so long as such persons have ample funds to conduct a proxy contest."

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman; John S. Nolan, Vice Chairman.**

Corporate Liquidations Under the 1954 Internal Revenue Code

■ In any brief commentary on the changes introduced by the Internal Revenue Code of 1954, it is difficult to avoid on the one hand broad and sometimes dangerous generalizations and on the other hand intricate and incomprehensible details. In the present discussion of the changes made by the new provisions relating to corporate liquidations, an effort is made to meet this dilemma by emphasizing the limitations upon and exceptions to the changes in the general rules. Of course, the references to such limitations are in the nature of *caveats* only and are not intended as a full exposition. The following discussion is arranged to follow substantially the structure of the part* of the 1954 Code relating to corporate liquidations.

A. Effects of Corporate Liquidations upon the Recipients.

(1) *Recognition of gain or loss to shareholders upon liquidation.*

(a) *General rule.* In general, as under the 1939 Code, amounts distributed in complete or partial liquidation of a corporation are treated as in full payment in exchange for the stock. (Section 331; 1939 Section 115(c).) "Partial liquidation" is specially defined in Section 346, so that it is now necessary to use that term as a phrase of art. Generally, the gain to the distributee will be capital gain, long or short term, depending upon his holding period for the stock in the liquidated corporation. As under the prior law, an exception is made in the case of liquidations of collapsible corporations. (Section 341; 1939 Section 117(m).) This section will be separately discussed herein.

The restricted meaning of "partial liquidation" under the definition thereof in Section 346 of the new Code makes it possible to include in the Code an express provision (Section 331(b)) making it clear that if there is a true distribution in "liquidation" (whether complete or partial), then Section 301 (relating to the effects to the shareholder of a distribution of property other than in liquidation) has no application. In other words, if there is a "liquidation", then by definition there cannot be a "dividend". (Regulations, Section 1.331-1(a).) For a more extended discussion of distributions of dividends, see Kumler, "Corporate Distributions of Stock: A Bird's-Eye View of the New Code Provisions", 41 A.B.A.J. 29, 30 (January, 1955).

The regulations (Section 1.331-1(b)) contain an express *caveat* that a distribution made in connection with a liquidation of a corporation *may* have the effect of a dividend under Section 301 if the liquidation is followed by a reincorporation, or is preceded by an incorporation, of part of the assets of the liquidating corporation. The regulations do not elaborate on this point, but presumably the *caveat* referred to is intended to advise that the prior law, as exemplified by *Lewis* v. *Commissioner*, 176 F. 2d 646 (1st Cir. 1949); *Estate of Hill*, 10 T.C. 1090 (1948) (see also *Survaunt* v. *Commissioner*, 162 F. 2d 753 (8th Cir. 1947))—all decided under the 1939 Code—remains unchanged and unclarified.

(b) *Exceptions.*—No gain or loss is recognized to the distributee upon the complete liquidation of a corporation if the distributee is also a corporation and owned more than 80 per cent of the outstanding stock of the liquidating corporation. (Section 332.) Although this provision is substantially the same as that in the 1939 Code provision (1939 Section 112 (b) (6)), there are two changes from the prior law which merit comment.

First, the new Code eliminates the provision of 1939 Section 112(b)(6)(A) under which that section would not apply if the parent corporation at some time on or after the adoption of the plan of liquidation and until the receipt of the property from the subsidiary owned *more* stock than that owned at the time of the receipt of the property. Under the new rule the section will apply if the parent holds the requisite 80 per cent of stock at all times from the adoption of the plan to the receipt of the property in liquidation of the subsidiary, regardless of whether some stock in excess of that percentage was added or disposed of during that period.

Secondly, the new Code provides that the fact that the subsidiary is indebted to the parent and the indebtedness is satisfied by the transfer of property in connection with the liquidation does not require the recognition of gain or loss to the subsidiary. (Section 332(c).) The Senate Report (No. 1622, 83d Cong., 2d Sess. 255) states that this provision is intended to overrule I. T. 4109 (1952 C. B. 138) insofar as that ruling relates to the realization of gain or loss by the subsidiary which transfers property in satisfaction of an indebtedness, but is *not* intended to change the law with respect to the tax treatment to the *parent* upon the receipt of the property in satisfaction of the indebtedness.

Another exception to the general rule of recognition of gain or loss upon the complete liquidation of a corporation is found in the provision for an election as to partial nonrecognition of gain in connection

* Part II of Subchapter C, of Chapter 1, of Subtitle A of the Code, containing §§331 to 346.

with a liquidation in one month. (Section 333.) A similar election was heretofore given from time to time (1939 Section 112(b) (7).) The 1954 Code makes this election a permanent part of the Code, without substantial change. (Section 333.)

(2) *Basis to recipient of property received as a distribution in liquidation.*

(a) *Taxable distributions.* In general, if gain or loss is recognized to the distributee on a distribution in complete or partial liquidation of a corporation (*i.e.*, if the general rule of Section 331 applies), then the basis to the distributee of the property received in the liquidation is the fair market value of the property at the time of the distribution. (Section 334(a).) This was also the rule under the prior law, but there is no statutory counterpart in the prior Code.

(b) *Non-taxable distributions.*—On the other hand, if, under Section 332 (relating to complete liquidation of subsidiary corporations) gain or loss is *not* recognized to the distributee upon the distribution in liquidation, then, as under the prior law, the basis to the distributee of the property is the same as the basis of such property in the hands of the distributing corporation. (Section 334(b) (1); 1939 Section 113(a) (15).) In other words, there being a "tax-free" exchange, there is a carry-over basis. The same rule now applies with respect to property transferred by the subsidiary to the parent in satisfaction of indebtedness in connection with the liquidation of the subsidiary. (Sections 334 (b) (1) and 332(c).)

In the case of a "one-month" liquidation as to which the permissible election as to nonrecognition of gain has been made under Section 333, the distributee takes the distributed property at a basis equal to the distributee's basis for the stock cancelled or redeemed in the liquidation, decreased in the amount of any money received by him, and increased in the amount of any gain recognized to him. (Section 334(c); 1939 Section 113(a) (18).)

Under prior law, there was a court-made exception to the rule of a carry-over basis in the case of the complete liquidation of a subsidiary (*i.e.*, the rule now stated in Section 334 (b) (1)), where it was established that the parent had purchased the stock of the subsidiary for the purpose of acquiring the assets of the subsidiary and had promptly liquidated the subsidiary. In such case, the assets were given a basis equal to the price paid for the stock. The precise nature of this exception was not definitely established. The latest application of the principle was in *Kimbell-Diamond Milling Co.*, 187 F. 2d 718 (5th Cir. 1951), *cert. den.* 342 U. S. 827.

The 1954 Code (Section 334(b) (2)) incorporates a statutory principle comparable to that of the *Kimbell-Diamond* case, but varying in specific details. Generally, this rule applies if the stock was purchased within two years of the adoption of the plan of liquidation, and, where applicable, requires the use by the parent of a basis for the distributed property equal to the amount paid by it for the stock of the subsidiary. (Section 334 (b) (2) (A).) However, the other statutory requisites to the application of this special rule make it exceedingly dangerous to rely on generalizations as to its applicability.

For example, it must be shown that all of such stock was acquired during a period of not more than twelve months, and was acquired by "purchase". (Section 334(b) (2) (B).) "Purchase" is expressly defined (Section 334(b) (3)) so as to *exclude* any acquisition in a "nontaxable" transaction, such as upon a tax-free transfer to a controlled corporation in exchange for stock in that corporation. (See Section 351.) In addition, there is excluded from the definition of "purchase" any stock acquired from a person the ownership of which would, under Section 318 (relating to constructive ownership by certain "related" persons), be attributed to the person acquiring such stock.

B. Effects of Corporate Liquidations upon the Liquidating Corporation.

(1) *Recognition of gain or loss to the liquidating corporation.* There is now included in the Code an express provision that as a general rule gain or loss is not recognized to the corporation upon the distribution of property in partial or complete liquidation. (Section 336.) An exception, however, is expressly provided in Section 336 with respect to distributions of "installment obligations". As to this class of distributed property, the provisions of Section 453(d) apply.

Under the general rule of that section (Section 453(d) (1)), the deferred gain or loss on an installment obligation is realized in full when any "disposition", including a distribution in liquidation, is made of the obligation. Section 453(d) (4), however, expressly provides for certain exceptions to this general rule. Under these exceptions no gain or loss is recognized to the distributing corporation with respect to the distribution of installment obligations (A) if, under Section 332 (relating to the complete liquidation of subsidiaries), no gain or loss is recognized to the distributee corporation; or (B) if, under Section 337 (relating to gain or loss on sales or exchanges in connection with certain liquidations), no gain or loss *would have been* recognized to the liquidating corporation *if* the corporation had *sold* such installment obligation on the day of such distribution.

(2) *Sale by corporation in process of liquidation.*—If the corporation *sells* any property (instead of distributing it in kind, in exchange for shares, in complete or partial liquidation), then gain or loss would, under the general rules, be recognized to the corporation. In the case of gain, there would thus be a double tax—once at the corporate level upon the sale, and once at the stockholder level upon the liquidation. Under prior law, the efforts of taxpayers (when gain was involved) to avoid the tax at the corporate

level by way of first liquidating the corporation and then having the distributee stockholders make the sale, and the opposing efforts of the Commissioner to treat such sales as being in reality made by the corporation rather than by the shareholders following liquidation, resulted in considerable litigation and confusion. The leading cases are *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, (1945), and *United States* v. *Cumberland Public Service Co.*, 338 U. S. 451 (1950).

Section 337 of the 1954 Code provides certain statutory rules which are intended to alleviate the problems in the *Court Holding Co.* area. Generally, if a corporation adopts a plan of complete liquidation and within the 12-month period thereafter all of the assets of the corporation (less only assets retained to meet claims) are in fact distributed in complete liquidation, then, under the new provision, no gain or loss is recognized to the corporation from the sale or exchange by it of property within such 12-month period. However, reliance on such generalizations may prove to be dangerous. For, by express limitations and qualifications in the statute itself, and by way of interpretations in the regulations, the section may result merely in the substitution of new and equally difficult factual questions for the question of "who made the sale", which the statute seeks to avoid.

For example, the non-recognition provisions of Section 337 apply only with respect to a sale by a corporation subsequent to the adoption of a plan of complete liquidation and within the 12-month period beginning on the date of the adoption of such plan. All of the assets of the corporation, less only assets retained to meet claims, must be distributed in complete liquidation within such 12-month period. The question of the time of "adoption of the plan" therefore becomes of importance. On this question, however, the regulations provide, in part, as follows:

> For the purpose of Section 337 (a) the date of adoption of the plan of complete liquidation of a corporation is the date on which occurs the first step in the execution of such plan, but not later than the date of the adoption of the resolution of the shareholders authorizing the distribution of the corporate assets in redemption of all of the stock pursuant to which the corporation is liquidated. In determining such date, consideration will be given to the dates of any sales of property (as defined in Section 337 (b)) not ordinarily made in the conduct of the business as well as to all other relevant facts and circumstances. [Section 1.337-2 (b).]

This regulation thereby creates a serious factual problem as to when a plan is adopted, which otherwise might be considered no problem at all.

In this connection, it is to be noted that the regulations expressly provide that ". . . [if] the other conditions of this section are met, Section 337 applies whether the corporation or its stockholders, in fact, effected the sale." (Section 1.337-2 (a).) This seems to write into the law something which is not there and thereby to apply the limitations of the section to a transaction not covered by the section. In fact, Section 337 expressly refers to sales *by the corporation*. Whether the sale is by the corporation is a question of fact, and the Treasury should not be upheld in substituting a rule of law for this question of fact. This particular problem becomes of importance because of the uncertainty that has been introduced, as stated above, in regard to the time of adoption of the plan of liquidation and the time of expiration of the twelve-month period commencing with the adoption of such plan. If the stockholders seek to avoid this uncertainty by way of effecting a sale by the shareholders after the liquidation, there is no sound reason for attempting to apply Section 337 to such a sale.

Additional complexities are injected by the Code itself into the statutory scheme for avoiding the difficulties of the *Court Holding Company* problems, by way of the statutory definition of "property" as to which the new non-recognition provisions of Section 337 apply. Thus, Section 337 (b) excludes certain sales and exchanges of inventory type of property, and of installment obligations, from the definition of property the sale of which is subject to the non-recognition provisions of Section 337 (a). Stated from an affirmative standpoint, Section 337(a) (non-recognition) applies as follows: In the case of sales or exchanges of inventory, etc., Section 337 (a) (non-recognition) applies only if the sale is of substantially all of the inventory which is attributable to *a* trade or business of the liquidating corporation, and is made to one person in one transaction, in accordance with Section 337. In the case of sales or exchanges of installment obligations which were acquired in respect of the sale of inventory, etc., Section 337 (a) (non-recognition) applies only if the sale which resulted in the acquisition of such installment obligations was one as to which the gain was not recognized under the above-stated provision relating to sales of inventory, that is, if the sale in respect of which the installment obligation was acquired, was of substantially all the inventory which is attributable to a trade or business of the corporation, and was to one person in one transaction, and was "in accordance with Section 337". In the case of sales or exchanges of installment obligations which were acquired in respect of the sale of property other than inventory, Section 337 (a) (non-recognition) applies only if the sale which resulted in the acquisition of such installment obligations occurred on or after the date of the adoption of the plan of liquidation.

Furthermore, even if Section 337 is otherwise applicable, it is expressly provided that the section shall *not* apply to any sale or exchange made by a collapsible corporation, or made following the adoption of a plan of complete liquidation if Section 333 (relating to one-month liquidations) applies, or, with certain limitations, if Section 332 (relating to liquidation of subsidiaries)

applies. (Section 337 (c).)

Finally, in the case of a sale or exchange following the adoption of a plan of complete liquidation to which Section 332 applies, the limitation on the applicability of the non-recognition provisions of Section 337 is twofold. First, it is provided (Section 337 (c) (2) (A)) that the non-recognition rule of Section 337 shall *not* apply to a sale in connection with the complete liquidation of a subsidiary under Section 332 if, under Section 334(b) (1), there is a carry-over basis to the parent corporation as distributee. Secondly, it is provided (Section 337 (c) (2) (B)), that the non-recognition rule of Section 337 *shall* apply, but to a limited extent only, to a sale in connection with the complete liquidation of a subsidiary under Section 332 if, under Section 334 (b) (2) *(i.e.,* the statutory *Kimbell-Diamond* rule), the parent's basis for the distributed property is the same as its basis for the subsidiary's stock held by the parent. For example, under the latter limitation gain would not be recognized to the extent of any appreciation in the value of the assets after the parent acquired the stock of the subsidiary and prior to the sale by the subsidiary in connection with a plan of complete liquidation under which the parent would be entitled to the benefit of the substitute-basis provisions of the statutory *Kimbell-Diamond* rule.

C. Collapsible Corporations.

As under the prior law, gain upon the sale or exchange (including exchange upon liquidation) of shares of a "collapsible" corporation is treated as ordinary income rather than capital gain. (Section 341; 1939 Section 117 (m).) The new section incorporates the rule of the prior regulations that distributions from proceeds of a loan in excess of the adjusted basis of the property by which the loan is secured are to be treated as gain from the sale of property which is not a capital asset. (Section 341 (a) (3).) A definition of "Section 341 assets" is added, and includes, in addition to property held primarily for sale, etc., and certain unrealized receivables, property (old Section 117 (j) type of assets) used in a business *other* than the construction, etc., of the Section 341 assets. (Section 341 (b) (3).) In determining whether the three-year holding period for "Section 341 assets" has been satisfied, tacking of the holding periods of parties in a non-taxable exchange is permitted as provided in Section 1223. (Section 341(b) (3).) However, it is expressly provided that no such holding period shall be deemed to *begin* before the *completion* of the construction, etc. *(Id.)* There is a new presumption that a corporation is a collapsible corporation if the fair market value of its "Section 341 assets" is 50 per cent or more of the fair market value of its total assets and *120 per cent or more* of the adjusted basis of such "Section 341 assets". (Section 341 (c).) It is expressly provided, however, that the absence of either of these conditions shall not give rise to a presumption that the corporation is not a collapsible corporation. *(Id.)* The section is not applicable to a shareholder owning less than 5 per cent in value of the outstanding stock of the corporation, as compared with 10 per cent under the prior law. (Section 341 (d) (1); 1939 Section 117 (m) (3) (A).) Under both provisions, however, there are constructive ownership rules that should be carefully examined before concluding that any given shareholder is not subject to the collapsible corporation provisions. (Section 341 (d); 1939 Section 117 (m) (3).)

D. Conclusion.

The new Code provisions, and particularly Sections 334 (b) (2) (the statutory *Kimbell-Diamond* rule), and 337 (covering the *Court Holding Co.-Cumberland Public Service Co.* problem) will undoubtedly aid persons advising as to the tax consequences of corporate liquidations and of sales in connection therewith. However, great care must be exercised to ascertain whether the general rules that have been established are in fact applicable under the facts of any given case. The regulations are sometimes helpful but also sometimes seem to go beyond the terms of the statute. Nevertheless, in *planning* any transaction it would usually be preferable to conform to the interpretation in the regulations rather than to invite controversy with the Treasury.

Regional Meeting

(Continued from page 1142)

in the St. Paul Hotel, the headquarters, and also in the St. Paul Auditorium and the Lowry Hotel. Special entertainment was provided for women guests, including a style show, a luncheon and a "Harvest Brunch".

William W. Gibson, of Minneapolis, was General Chairman of the regional meeting, with John C. Burke and Ivan Bowen as Co-Chairmen. Chairman Gibson was stricken ill on the closing day of the program, and was unfortunately prevented from participating in the climactic closing banquet which he had done so much to make a gala event.

The final regional meeting of the year—the Deep South Regional Meeting in New Orleans—was scheduled for November 27 to 30 and will be described in the January issue of the Journal. The first regional meeting of 1956 will be held in Hartford, Connecticut, April 15 to 18, for lawyers of the Northeastern states.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ **From time to time accounts of significant projects which involve substantial research and complex problems of drafting are published in these pages. Such a project is discussed in the following article by Professor Jones, a well-known authority in the field of legislation, and the former Editor-in-Charge of this department.**

Reflections on "Conservation Law and Administration"

by Harry Willmer Jones, Professor of Law, Columbia University Law School.

■ Off and on, during the past ten years or so, the present writer has attempted to describe the kind of disciplined research that must go into any honest job of legislative improvement of the law. It is a familiar story to the working legislative draftsman that every line of a tightly-drafted statutory proposal represents the distillation of hours of study addressed to the proposal's general context, to the history of past legislative and administrative efforts, and to comparative experience in other fields of regulation and in other jurisdictions. We have many so-called "model statutes" to look at but not, unfortunately, many published models of sound and imaginative legislative research. *Conservation Law and Administration*, by Professor William F. Schulz, Jr., of the Pennsylvania Bar and the University of Pittsburgh Law School, is richly worthy of examination and emulation, as a legislative research job of extraordinary thoroughness, competence and integrity.

Professor Schulz's statute, entitled the "Model Conservation Administration Act", but drafted with particular reference to Pennsylvania problems and experience, consists of seventeen sections and, with detailed draftsman's comments, runs slightly over eighteen pages. The background and supporting studies, which make up the bulk of his book, require almost six hundred pages. This is a ratio—thirty-one pages of background research to one page of statutory text—that would have gladdened the hearts of Joseph P. Chamberlain, Middleton Beaman, and the other founders of the "wisdom through diligence" school of legislative drafting. Conservationists, sportsmen and others with a special interest in the problems of state administration of renewable natural resources will turn to *Conservation Law and Administration* for its comprehensive description and evaluation of law and practice in the specific field of resource-use. For the present writer, the book has an even broader value as a case study in state law-development and a uniquely suitable starting point for certain general reflections on the processes of law-making and law administration in any field of legislative regulation.

The conservation law study was undertaken by the University of Pittsburgh Law School under the sponsorship of the Conservation Foundation, which selected Pennsylvania experience for specific examination because of the wide range of conservation problems raised by that state's complex agricultural and industrial economy. "Conservation" is broadly defined for the purposes of the study, its major headings including wildlife protection, water management, forestry, soil conservation and recreation. In Pennsylvania, as perhaps elsewhere, public intervention for the protection of renewable natural resources has deep historical roots. Game privileges are referred to in the William Penn Charter of 1683, and the first Pennsylvania closed season on deer was established in 1701. The origins of the Pennsylvania water management program date back, at least, to 1866, and the first steps in legislative intervention in forestry and soil conservation were taken in 1895 and 1913 respectively.

The chronicle of Pennsylvania regulatory experience in resource-use is by no means as dry as one might expect. The colorful Gifford Pinchot came to Pennsylvania after his collision with Secretary Ballinger had wrecked his federal forestry career, and Pinchot had opportunities, as Pennsylvania Commissioner of Forestry during 1920 to 1923 and as Governor in 1923-27 and 1931-35, to influence the course of development of state practice in his field of dedicated interest. High drama attended the efforts of the Game Commission, shortly after the turn of the century, to enforce the Pennsylvania game and fish laws. Fourteen game protectors were shot at in a single year, 1906, and four of them were killed. Black Hand letters, the "Honorable Society" of the Mafia, and the Pinkerton detective agency all figured in the story before, as Professor Schulz puts it, "shooting game wardens lost popularity as a means of expressing disagreement with the Game Laws". Who would have suspected this continuing vitality of the Second Amendment in what we think of as the Quaker State?

Just about every problem characteristic of state legislative development generally makes an appearance in *Conservation Law and Administration*. Are you interested in the drafting problems of the Uniform Commercial Code? Then compare how Professor Schulz and his research colleagues, in their field of study, had to take account of the gaps and overlappings in statutory coverage inevitable whenever a jigsaw of regulation has been developed by legislators on an *ad hoc* basis over a period of many years. Is your interest in appropriation procedure as a means of legislative control of

administrative action? If so, examine the status of the Pennsylvania fish and game commissions, whose incomes from fees and fines make it unnecessary for them to go hat-in-hand to the legislature for appropriations. Is your focus of interest on pressure groups and their legislative influence? Then read Professor Schulz's description of the sportsman's lobby, cutting across party lines to support the virtual autonomy of the Game Commission, and sometimes overplaying its hand and causing the "vanishing" deer to flourish on the farm lands of Pennsylvania like the jackrabbit on the plains of Australia.

The foregoing are only a few of the major law-making problems that can be illustrated by reference to Professor Schulz's book. There are others, perhaps of even greater general significance. What happens, for example, when a state legislative body records its high intentions in a substantive statute but withholds the appropriations necessary to make those intentions effective? Conservation law, like other fields of regulation, has suffered the curse of unenforced laws, the "false sense of accomplishment" that too often attends the enactment of legislation never really intended to be enforced. Have you ever wondered whether high-sounding statutory preambles, prepared to anticipate constitutional objections, ever carry over in their influence after the constitutional question is settled? Then read Professor Schulz's analysis of the difficulties caused in Pennsylvania and elsewhere by the fact that the whole notion of "soil conservation", as a legislative idea, originated as a kind of constitutional convention or fiction, formulated originally to enable Congress to get more money to the farmers. Last, but certainly not least, *Conservation Law and Administration* has a useful discussion, valuable far beyond its immediate regulatory field, of the problems of legislative drafting and law administration involved in a typical and important area of federal-state, and interstate, co-operation.

It should be noted that the proposed statute itself, the Model Conservation Administration Act, is restricted essentially to administrative provisions and amounts to a kind of organic act for an integrated state Department of Conservation. This limitation represents a decision on the part of the responsible draftsmen not to follow through on the original idea of preparing a complete substantive Conservation Code. By way of compromise with the original complete codification idea, the Model Act makes it a first assignment of the new Department to prepare a complete Conservation Code and submit it to the legislature for enactment. If and when the Secretary of a new Pennsylvania Department of Conservation gets to this major enterprise in substantive codification, the matter of choice of draftsman will certainly have top priority. Fortunately for the Secretary, the ideal man will be all set and ready for the job—William F. Schulz, Jr., of the University of Pittsburgh Law School.

Notice by the Board of Elections

■ The following jurisdictions will each elect a State Delegate for a three-year term beginning at the adjournment of the 1956 Annual Meeting and ending at the adjournment of the 1959 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

Nominating petitions for all State Delegates to be elected in 1956 must be filed with the Board of Elections not later than March 30, 1956. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt February 27) cannot be published prior to distribution of ballots, which will take place on or about April 6, 1956.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 30, 1956.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

The Year 1955 in the Junior Bar Conference

Stanley B. Balbach, Conference Chairman

■ We are proud of the year 1955 in Junior Bar Conference history because we have worked and as evidence of our work we cite these projects:

1. *Group Life Insurance Program.* Literally hundreds of us participated in this successful campaign.

2. *American Medical Association.* We have created a special medical-legal committee to work with that organization.

3. *Annual Meeting.* Headed by Bill Fuchs, of Philadelphia, this committee was host to our group in Philadelphia and the Conference could not have been more adequately received and entertained. This committee was confronted with and solved an annual meeting problem such as that which would confront the average state association.

4. *Membership.* Through Tom Taulbee, of Wilmington, Delaware, our Conference has been the major membership arm of the Association.

5. *Increased State Junior Bar Activity.* Thirty-eight states were represented at our annual meeting in Philadelphia.

6. *Public Information.* This workhorse committee, under the leadership of Jack Deacon, of Jonesboro, Arkansas, publicized Conference activity, arranged a regional program in Phoenix, distributed a number of working ideas to its members and inaugurated a citizenship effort.

7. *Military Service.* Paul Madden, of Washington, D. C., as chairman, has intervened to help young lawyers or law students with deferment problems or problems of non-legal assignment in the military forces.

8. *Bar Association of Mexico.* We have contacted the Ambassador and Bar Association officials to offer our experience in Junior Bar organization.

9. *Canadian Bar Association.* Working with their Junior Bar Section, they have adopted our plan of not conflicting with the senior association on annual meeting and have formed a special committee to work more closely with us.

10. *Jenkins-Keogh Bill.* Bob Richardson, of Atlanta, Georgia, our activities chairman, appeared before the congressional committee in support of this legislation.

11. *Conference on Personal Finance Law.* Four of our most active members, Bob Meyer, of Los Angeles, Ray Christensen, of Salt Lake City, Kirk McAlpin, of Savannah, Georgia, and Jack Deacon, of Jonesboro, Arkansas, participated in the annual debate at the American Bar Association meeting.

12. *Section of Corporation Banking and Business Law.* Pat Kelly, of Des Moines, Iowa, the Chairman of our Law Students Committee, discharged a research project problem assigned by that section to us.

13. *Section of International and Comparative Law.* Once again we sponsored with this section a luncheon at which the principal speaker was Harold E. Stassen, Special Assistant to President Eisenhower.

14. *Past Chairmen.* Social and business activity continue to tie our past chairmen to the Conference.

15. *Headquarters' Secretary.* Because of the understanding of the budget committee of our problems a headquarters' secretary now serves our Section.

16. *Travel of Officers and Council Members.* More states were contacted through visits, Circuit meetings or regional meetings than ever reported before by the Conference.

17. *Joint Circuit Meetings.* Under the leadership of Bert Early, of West Virginia, and Frank Reifsnyder, of Washington, D. C., a highly successful program featured this pilot effort.

18. *Workshop Program.* A successful how to do it program inaugurated last year was continued by Charles P. Storey, of Dallas, Texas, Chairman of our Affiliate Units Committee, at our annual meeting and is scheduled for various regional meetings this year.

19. *Our Newspaper.* With Charlotte P. Murphy, of Washington, D. C., as editor, we have again emphasized publicity on local groups, supported American Bar Association projects and published articles of educational interest to young lawyers.

20. *Procedural Reform.* Frederick G. Fisher, Jr., of Boston, as chairman of this committee, is responsible for the production of three pamphlets—one on the Missouri plan, one on administrative directors for state judicial establishments, and one on rule making power in the supreme courts of the states.

21. *Minor Courts Committee.* Kirk McAlpin, of Savannah, Georgia, the chairman thereof, reports that the committee recommends the Junior Bar Conference as going on record for the staffing of justice of the peace courts only with persons trained in the law.

22. *Awards of Merit Competition.* State Award of Merit for Achievement won by Michigan; Local Award of Merit for Achievement won by Baltimore; State Progress Award won by Arkansas; Local Progress Award won by Philadelphia; special award to Texas for service to public; and special award to Florida for service to the Bar.

23. *Special Membership.* This may be our most important project but it is too new to analyze.

The above list is not exhaustive. We feel that other national committees have made substantial contributions such as our Committees on Legal Aid, Traffic Courts, Lawyer

Placement, Practice Development, Lawyer Reference, Legal Institutes, By-Laws and Unauthorized Practice, but limitations of space prevent further detailing of our activities and prevent the acknowledging of the individual efforts of many of our members.

These concrete accomplishments are our justification for existence, but they are important mainly because they encourage interest by young lawyers in organized Bar activity, and it has been our theory that lawyers who are interested in organized Bar activity on the national level are very likely to be lawyers who are interested on the state and local leyel and the training that they receive with the Conference will redound to the benefit to the state and local groups.

We have had our disappointments and the Chairman-Elect, Robert G. Storey, Jr., when he takes office on January 1, 1956, will have with him and the Conference will have with it, these problems:

1. Budget. Although our budget was raised by $1,750 at the last meeting of the budget committee, we have a need to do additional travel in connection with our membership work if we are to achieve the membership that is possible in the Association, and we need an executive secretary to handle the administration of the affairs of a group of 11,000 lawyers, but these efforts are hampered by budget difficulties.

2. We need expanded programs in areas of particular interest to younger lawyers in lawyer placement, practice development and lawyer reference.

3. We need an over-all expanded program of Conference work to provide a place in organized Bar activity for every young lawyer who does not have a sufficient outlet at the state or local level and to interest those 600 individuals who wrote to headquarters saying they would like to work in organized Bar activity.

4. We need 100 per cent participation in Junior Bar activity by state and local Junior Bar groups and to secure this participation we must achieve financial support of these groups by the senior groups. The tremendous margins of time and energy of the young lawyer must be released.

5. Publications. Although a large portion of our budget is devoted to publications, we still have not achieved sufficient communication among our members.

6. Organization. Although our Council is to decide policy and our directors are to assist the chairman in his work of supervising the performance of the national committees, we still have organizational conflicts and the position of the state and local delegates is not clearly defined.

As we complete the year 1955 we may well be leaving more problems than we have solved, but what success we have achieved throughout the United States is due to personnel who have worked and we have a representative in each supreme judicial circuit, as well as certain at large areas, and a reading of these names indicates the truly nation-wide scope of our organization. Our Council includes Robert G. Storey, Jr., Dallas, Texas; Thomas G. Meeker, Washington, D. C.; C. Baxter Jones, Jr., Atlanta, Georgia; Frank Reifsnyder, Washington, D. C.; Frank L. Hinckley, Jr., Providence, R. I.; S. Michael Schatz, Hartford, Connecticut; F. Hastings Griffin, Philadelphia, Pennsylvania; Bert H. Early, Huntington, W. Virginia; Robert G. Nichols, Jr., Jackson, Mississippi; Rosemary Scott, Grand Rapids, Michigan; C. Severin Buschmann, Jr., Indianapolis, Indiana; G. Arthur Minnich, Jr., Carroll, Iowa; Robert L. Meyer, Los Angeles, California; Charles F. Malone, Roswell, New Mexico; Alvin B. Rubin, Baton Rouge, Louisiana; Ray R. Christensen, Salt Lake City, Utah, and our directors, Charles F. Malone, Roswell, New Mexico; William C. Farrer, Los Angeles, California; Charles B. Levering, Baltimore, Maryland and Morgan P. Ames, Stamford, Connecticut.

Old and New Officers and Council Members at the Annual Meeting in Philadelphia. Seated (left to right) C. Frank Reifsnyder, Washington, D. C.; Rosemary Scott, Grand Rapids, Michigan; Thomas G. Meeker, Washington, D. C.; Stanley B. Balbach, Urbana, Illinois; Robert G. Storey, Jr., Dallas, Texas; William C. Farrer, Los Angeles, California.

Standing (left to right) Alvin B. Rubin, Baton Rouge, Louisiana; F. W. McCalpin, St. Louis, Missouri; Robert L. Meyer, Los Angeles, California; Ray R. Christensen, Salt Lake City, Utah; G. Arthur Minnich, Jr., Carroll, Iowa; S. Michael Schatz, Hartford, Connecticut; Frederick G. Fisher, Jr., Boston, Massachusetts; Bert H. Early, Huntington, West Virginia; Robert R. Richardson, Atlanta, Georgia; C. Baxter Jones, Jr., Atlanta, Georgia; and C. Severin Buschmann, Jr., Indianapolis, Indiana.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The nation's foremost student advocates will argue a Clayton Act case this month in the final rounds of the Sixth Annual National Moot Court Competition.

Scene of the arguments will be the House of The Association of the Bar of the City of New York, whose Young Lawyers' Committee sponsors the yearly contests to encourage the art of appellate advocacy. The dates are December 14, 15 and 16.

First prizes include the John C. Knox Silver Cup; the Harrison Tweed Bowl; the William J. Donovan cash prize of $500, and an award from the American College of Trial Lawyers. Various publishers present law books to the members of the winning team and other competitors in the final rounds.

Some twenty-two teams will clash in the play-offs in New York. They are the victors of fifteen regional contests among the eighty-seven participating law schools.

The regional sponsors include the Junior Bar Section of the State Bar Association of Connecticut; the Young Lawyers' Section of the New York State Bar Association; the Young Lawyers' Committee of The Association of the Bar of the City of New York; the Committee on Moot Courts and Professional Education of the Philadelphia Bar Association; the Junior Bar Committee on Relations with Law Schools of the Bar Association of the District of Columbia; the Junior Bar Section of the North Carolina Bar Association; the Young Lawyers' Section of the Georgia Bar Association; the Cincinnati Bar Association; the Moot Court Subcommittee of The Junior Membership Committee of the Illinois State Bar Association; the Bar Association of St. Louis in conjunction with the Washington University School of Law; the Southern Methodist University School of Law; the Oregon Bar Association; the University of Colorado School of Law, and the Moot Court Committee of the Conference of Junior Bar Members of the State Bar of California.

■ A drama familiar to the lawyers of America has been re-enacted in the young and struggling nation of Pakistan. For some time, professional standards have been declining; judges have been insecure; justice has been slow and costly; and the lawyers, split among some twenty local bar associations, have had no unified strength in public affairs —even in the formation of the Pakistan Constitution. For years, lawyers, judges and others have made sporadic, abortive attempts to federate the local bar groups into an all-Pakistan association. During these years, one American jurist—Chief Justice Robert C. Simmons of the Supreme Court of Nebraska—furnished help and information to the Lahore High Court Bar Association, which was a leader in the movement for federation. Last summer in what one speaker called "this uncomfortable and sultry mid-July" lawyers from all over Pakistan met at Lahore. They adopted a constitution. Speaking with one voice, they condemned unprofessional conduct, some recent legislation, certain governmental actions. The new Pakistan Bar Association has joined what Chief Justice Simmons calls "the family of national associations of lawyers".

■ The Knoxville Bar Association and the University of Tennessee College of Law recently sponsored a trial practice institute. Among the guest speakers were William DeParcq, of Minneapolis; Hugh Head, Jr., Atlanta; A. Harold Frost, New York, and Fred B. Helms, of Charlotte. The institute, held at Knoxville, was under the Chairmanship of Professor Martin J. Feerick of the College of Law of the University of Tennessee.

■ The California State Bar is pushing ahead with its lecture series on medical aspects of personal injury litigation. In December the Continuing Education of the Bar Committee of the State Bar is sponsoring three two-hour meetings on head, neck and back injuries, with stress on proper handling of "craniocerebral", "whiplash", and "disc" cases. A doctor and a lawyer will address each meeting, and at a fourth session an experienced trial attorney will discuss pleading, depositions and the settlement of a personal injury action before trial.

■ Fall is the time for football games, small-game hunting and, apparently, conferences on federal taxation. The Detroit Bar Association reports a record attendance at its second annual lecture series on federal taxes for the general practitioner. Among the speakers were Paul E. Treush, Special Assistant to the Chief Counsel for the Internal Revenue Service; Professor Willard H. Pedrick, of the Northwestern Law School; and Charles L. Levin, J. Leon Katz and Justin C. Weaver, of Detroit.

The Eighth Annual Tax Conference of the University of Chicago Law School took place at the end of November. The conference, which was under the general chairmanship of William N. Haddad, of Chicago, was an appraisal of the Revenue Code of 1954 in the light of one year's operating experience.

In Iowa, the Hamilton County Bar Association conducted its second annual Tax Work Shop at Webster City early in November. And December brings the convocation of the Sixteenth Annual Tax School at Des Moines under the sponsorship of the Iowa State Bar.

The Sixth Annual West Virginia

Tax Institute will be held on December 8, 9 and 10, at the Daniel Boone Hotel in Charleston, West Virginia.

■ The Iowa State Bar Association has directed its Continuing Legal Education Committee to hold a number of legal institutes on the subject of pre-trial discovery procedure. At present, the advisory committee of the Iowa Supreme Court, at the request of the Court, is studying the entire subject of discovery with a view to possible changes. The legal institutes would help inform the lawyers of the state and assist the Supreme Court's Advisory Committee in making recommendations to the Court. A large number of Iowa lawyers are reported to be in favor of the federal rules of discovery.

■ The Utah State Bar has issued a revised edition of its "Title Standards" which first were adopted and published in 1945. In the introduction, Paul B. Cannon says the standards should unify opinion as to what constitutes a marketable title, and thus avoid good-faith disagreements among attorneys, which often are interpreted by clients as a sign of incompetence. Mr. Cannon adds that compliance with the standards should be competent court evidence of what constitutes marketability.

■ Gainesville, Florida, has recently been the scene of a pioneering series of lectures on the law and legal problems. The lectures and panel discussions were prepared for and delivered to "an intense and earnest" group of ladies—housewives, secretaries and other business women.

The seven-meeting series, entitled "Law for Women" was the work of the Eighth Judicial Bar Association, in co-operation with The Florida Bar and the General Extension Division of the University of Florida and the University's College of Law.

The series gave the ladies a broad outline of the law—its development, purposes, and procedures—and acquainted them with some elementary rules governing everyday transactions. The purpose was to impart understanding, not to stimulate self-help in complex matters.

W. C. O'Neal and Robert B. Mautz, of Gainesville, who describe the program in the *Florida State Bar Journal*, commend "Law for Women" to other bar associations.

■ The Chief Magistrate of the City of New York has announced commencement of a scientific study of the "scofflaw"—the chronic traffic offender who ignores legal process. Chief Magistrate John M. Murtagh told a tri-state Conference on Traffic Safety and Traffic Courts that the research project will study the nature and motivation of "scofflaws" with the help of psychologists, psychiatrists and family agencies. Judge Murtagh told the conference, sponsored by the New York University Center for Safety Education, that the fifty persons to be studied are those who have failed to respond to the courts and to the Traffic Court School administered by the city for habitual offenders.

The Services of the Cromwell Library

■ The Library Services Committee of the American Bar Foundation met at the American Bar Center on October 23, 1955. As was anticipated in the First Annual Report of the Foundation, recently published in the AMERICAN BAR ASSOCIATION JOURNAL, the Committee considered the extent of the services to be offered at the present time to state and local bar associations and to American Bar Association members by the Cromwell Library and authorized the Administrator and Librarian to announce the following:

1. *Readers' Service*—The use of the Cromwell Library's collection and its reading room by American Bar Association members.

2. *Photocopying Service*—The library has installed a modern photocopying machine and is prepared to make copies of court decisions, code or statute sections, government documents and materials appearing in legal periodicals. Subject to copyright restrictions, the library is ready to offer this service, furnishing, at an approximate cost of 25¢ per page, copies of material that a state or local bar association or an American Bar Association member is unable to secure locally.

3. *Clearing House Service*—Information on unpublished legal theses and dissertations in American law schools and current legal research projects now in progress, the results of which have not as yet been published.

Requests for these services should be addressed to: Cromwell Library, American Bar Foundation, 1155 East 60th Street, Chicago 37, Illinois.

Activities of Sections

SECTION OF ANTITRUST LAW

■ This Section is planning its annual spring meeting, customarily held at Washington, D.C.

The program will be devoted to a discussion of various facets of the Clayton Act. Competent speakers from various sections of the country will participate. The meeting will convene at a dinner, which numerous government officials will attend, to be held the evening before the day on which the papers are presented.

The Section participated in the American Bar Association 1955 Regional Meetings held at St. Paul, October 12-15, and at New Orleans, November 27-30, providing speakers who discussed antitrust problems.

Chairman Fred E. Fuller has made sweeping changes in the membership of the Section's various committees, to keep abreast of the rapid growth of the Section's membership.

SECTION OF JUDICIAL ADMINISTRATION

■ At the St. Paul Regional Conference, on Friday, October 14, an Institute on Practical Evidence was conducted under the joint auspices of the Section of Judicial Administration and the Minnesota State Committee on Improving the Administration of Justice. The Institute lasted all day. It was well attended, the average size of the audience being about 700. Leslie L. Anderson, Judge of the District Court of Hennepin County and Chairman of the Minnesota State Committee, presided and introduced the moderator and the members of the panel.

Alexander Holtzoff, of the United States District Court for the District of Columbia and Chairman of the Section of Judicial Administration, acted as moderator. The panel consisted of Professor Edmund M. Morgan, formerly of Harvard Law School and now of Vanderbilt University Law School; Acting Dean David Louisell, of the University of Minnesota Law School; Frederic M. Miller, former Chief Justice of the Supreme Court of Iowa; Harry H. Peterson, former Attorney General of Minnesota and former Justice of the Supreme Court of Minnesota; Edwin Cassem, of Omaha, Nebraska; Edwin C. Conrad, of Madison, Wisconsin; and E. M. Hall, Q. C., Saskatoon, Saskatchewan, Canada.

The proceedings of the Institute consisted of brief discussions by various members of the panel of about thirty questions, previously prepared, involving topics in the law of evidence on which the authorities were divided, as well as matters in respect to which some change was urged. There were also numerous questions from the floor.

SECTION OF CRIMINAL LAW

■ Two new committees are being organized within the Section of Criminal Law. One will concern itself with "Lawyer Participation in Criminal Enterprises"—attempting to define the subtle lines between legitimate counseling and advice, on the one hand, and direct participation in criminal conspiracies or the fruits of crime, on the other. It has also been suggested that this committee might examine the responsibility of lawyers, as members of the Bar, in the discharge of public offices concerned with legal services and law enforcement. *Quaere*, for example, whether the district attorney or prosecutor is accountable for defections towards his client-employer on a different basis from that underlying the ordinary lawyer-client relationship.

The second new committee is being formed by splitting the present group concerned with "Procedure, Prosecution and Defense", so as to separate the prosecutive and defense functions. The two resulting committees will be named, respectively, "Prosecution Procedures and Strategy" and "Defense Procedures and Strategy". It is hoped that the second will create a focal point for those members of the Section who are primarily interested in the defense of criminal cases and problems of law enforcement from the defendant's viewpoint.

Other standing committees of the Section are carrying forward the projects assigned to them last year. The committees are Crime Portrayal in Public Media; International Criminal Law; Juvenile Delinquency; Membership; Narcotics and Alcohol; Organized Crime; Police Training and Administration; Scope and Program; Sentencing, Probation and Parole; Taxation; and Traffic and Magistrate Courts. Association members interested in serving on any of those committees are cordially invited to communicate with Walter P. Armstrong, Jr., Chairman, Commerce Title Building, Memphis 3, Tennessee, or with Rufus King, Secretary, Southern Building, Washington 5, D. C.

Paul CARRINGTON

Gittings

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

■ Each of the sessions of this Section was well attended at the Philadelphia Meeting. At the first there were presented a debate on "Should Cumulative Voting for Directors Be Mandatory?", a discussion on "Corporate Democracy and Classified Directors" and an address on "Contrasts Between the English and American Law of Business Corpora-

tions". At the second there was a panel discussion on "How the Uniform Commercial Code Has Affected Bank Operations in Pennsylvania". At the third, a discussion of "The Montgomery-Ward Proxy Contest", by the participants in that case, concluded with an address by the Chairman of the SEC on the role of that commission in proxy contests of listed companies.

A full report of these proceedings of the Section appears in the quarterly magazine of the Section, *The Business Lawyer*. Members of the Association enrolling in the Section will, so long as copies are available, be able to obtain a copy of this issue.

In addition, two half-day meetings of the Division of the Section on Food, Drug and Cosmetic Law were held; the proceedings of that division are presented in the current issue of the magazine of that division, *Food-Drug-Cosmetic Law Journal*, published monthly.

At the meeting of the Section the following officers were elected: *Chairman*, Paul Carrington, Dallas, Texas; *Vice Chairman*, Churchill Rodgers, New York, New York; *Secretary*, Arthur Littleton, Philadelphia, Pennsylvania. As new members of the Council of the Section the following were elected: Carl W. Funk, Philadelphia, Ralph H. Demmler, Pittsburgh, Pennsylvania, George C. Seward, New York. As the representative of the Section in the House of Delegates, the Section elected the retiring chairman, Ray Garrett, of Chicago.

At the Regional Meeting of the Association in Saint Paul on October 12-15, the Section presented a half-day program consisting of a panel discussion on "Creditors' Rights". Joseph H. Colman, of Minneapolis, presided. Members of the panel and their subjects at this session were Sydney Krause, of New York, who also served as moderator, "Creditors' Rights in Proceedings under Chapter X of the Bankruptcy Act"; Norman H. Nachman, of Chicago, "Creditors Rights in Proceedings under Chapter XI of the Bankruptcy Act"; Harry S. Gleick of St. Louis, "Creditors' Rights in Other Bankruptcy Proceedings"; Raymond A. Scallen, Minneapolis, "Creditors' Rights in Litigation other than Bankruptcy"; and Charles W. Bunn, of Madison, "Creditors' Rights as Affected by the Uniform Commercial Code". Canadian participants were D. A. Thompson, Q.C., and Clive Tallin, Q.C., both of Winnipeg.

At the Regional Meeting of the Association in New Orleans, November 27-30, the Section presented a half-day program consisting of a panel discussion on the same subject. Paul Carrington presided. Milton P. Kupfer, of New York, served as moderator. Panelists were W. Randolph Montgomery, of New York, on "Creditors' Rights in Proceedings under Chapter X and XI of the Bankruptcy Act"; Charles A. Horsky, of Washington, on "Creditors' Rights in Other Bankruptcy Proceedings"; Frontis H. Moore, of Birmingham, on "Creditors' Rights in Litigation Other Than Bankruptcy"; and J. Francis Ireton, of Baltimore, on "Creditors' Rights as Affected by the Uniform Commercial Code". The proceedings of these two Section meetings will be presented in the January issue of *The Business Lawyer*.

The Section has many strong and able committees active in their various fields. The reports of their activities are presented currently in issues of the quarterly magazine of the Section.

SECTION OF INSURANCE LAW

■ Under the chairmanship of Walter A. Mansfield, of Detroit, Michigan, the Section of Insurance Law has just completed the most successful year in its twenty-four years. W. Percy McDonald, of Memphis, Tennessee, who was elected Chairman at the Annual Meeting in Philadelphia, attributes this successful year to the substantial increase in Section membership, to the increasing significant activities of Section members and committees, to the participation by members at the Phoenix and Cincinnati Regional Meetings and to the great enthusiasm for the Section program that was evidenced at the Philadelphia meeting.

The purpose of the Section is to promote the development of the law of insurance in all of its branches, to stimulate and extend this field of the law, to co-operate in obtaining uniformity and intelligent interpretation of Insurance Law with respect to both legislation and administration and to simplify and improve the application of justice in insurance law. The organization of the Section reflects these purposes and contemplates the broad latitude of insurance law and its relationship with the complexities of the business, social and political community.

Participation by the Section at the regional meetings has emphasized legal-medical discussions and trial tactics panels. At both the Minneapolis Regional Meeting and the New Orleans Regional Meeting, Mr. McDonald presided. Of particular interest to the trial attorney has been the presentation by well-known physicians and surgeons of medical subjects which are of particular concern to litigation involving personal injury. In the presentation of such material, a completely objective presentation is made, the goal being to not only instruct the trial attorney as to the correct procedure in the presentation of medical evidence, but also to acquaint the trial attorney with the clinical steps taken by the physician to arrive at his conclusion or point of view.

While the response to the legal-medical panels and trial tractics panels has been most gratifying, activities of other general committees of the Section have also been of particular interest to the lawyer in the practice of law. Mr. McDonald has announced that the Section will participate in the regional meetings to come and anticipates the possibility of the creation of new general committees because of the development of new problems within the area contemplated by the Section.

Specialization
(Continued from page 1105)
the general practitioner where the *ad hoc* partnerships have been established.

4. There is a fear that splinter groups will be established and that the profession will split itself into various factions.

5. There is fear that the recognition of specialists will encourage the unauthorized practice of law.

6. There is the fear that the American Bar Association is not the proper body to initiate a recognition and control of specialists.

These objections are directed either at a complete misconception of what is taking place today in the legal profession or at a complete misconception of the proposals that are being advanced to bring specialization under control. All objections are directed at the by-products of uncontrolled or unguided specialization which are resulting from the failure of the profession to exert leadership. No one is suggesting any state sanctions. No one is suggesting that state licensing agencies divide the profession into separate specialty Bars. No one is suggesting that a person licensed to practice law should not be permitted to practice any and all phases of law. A lawyer will still be a lawyer entitled to practice law as he chooses under any conceivable specialty control arrangement.

Whereas today the general practitioner is having difficulty in ascertaining what lawyers are competent when he needs help or refers business, with the suggested form of control exercised by the national legal organization, he will be able easily to find competent persons capable of giving him assistance when needed.

Today's specialists and general practitioners advertise in law directories. This should be sufficient. Clients directly employ specialists today. Even now one lawyer may lose a client to another lawyer whether or not he is a specialist. Today with many members of the Bar it is impossible to get legal services as to all matters. The situation today is fast approaching a condition which will be very difficult to control.

The evil lies not in specialization but in the development of (1) the "in-looking" specialist, and (2) the narrow, uncontrolled specialty organization. By "in-looking" specialist is meant the specialist who interprets all life in terms of his own specialty, knowling little of the relationship of his specialty to the rest of law and society and caring less. Nothing in today's specialization will prevent the development of such a person. What is needed is a plan to assure extra competence in a field and to prevent the specialist from becoming "in-looking". Is not this the answer to the unauthorized practice objection? The ability of lawyers to see the legal problem in full context is one reason why lawyers are more competent to handle legal problems than non-lawyers. The control of specialization can aid in preventing the "in-looking" lawyer. If specialization is left uncontrolled, if the "in-looking" specialist is permitted to develop, those interested in the prevention of unauthorized practice will have little ammunition.

The prevention of the "in-looking" specialist seems to require control by the profession over specialists and the creation of some type of standards to assure extra competence, not only within his specialty, but also as to its relationship with other fields of the law. If the profession developed standards of practice, proficiency and education for the control of specialization and gave guidance to it through an agency of the organized Bar, it could avoid these by-products of specialization. If on the other hand the profession sits idly by and allows specialization to drift without guidance and control, without the creation of standards, these by-products will surely come. Even today the profession is being split by separate unguided specialty groups. It is essential that these control steps emanate from the profession in general if the public's confidence in lawyers is to be retained. The organized Bar must admit of its responsibilities. It must face the facts of our increased corpus juris and the exceedingly complex society in which we live today. It must give guidance and control to the development of specialties in the profession.

Controlling Specialization . . . *A Plan Must Be Adopted*

How then are these difficulties to be disposed of? It is crystal clear that they cannot be disposed of otherwise than by some organization which has standing and authority. The obvious organization is the American Bar Association. It has exerted leadership to improve the system of judicial administration, to improve the practice of law, to improve legal education and more recently to promote continuing legal education and to protect the public. It is and should be a spokesman for the profession. To it the public looks for guidance and for help not only in improving our system of administering justice, but also in making available more and better legal services. It is the only nationwide agency capable of giving guidance to and exercising some degree of control over the problem of specialization in law.

It must devise the plan and set up the machinery. This is not a provincial problem. It is not fair to say that this is a problem for Washington, D.C., lawyers or New York lawyers. As has already been pointed out, lawyers in every community are limiting their practice. Everywhere lawyers are "advertising" themselves as specially proficient in certain fields of practice. Everywhere society is complex. Everywhere lawyers' obligations have increased. It would be wrong to think that if this problem were dealt with in few communities, it would be solved. The control of dental specialization apparently started on a state-by-state basis rather than nationally. Different standards for such specialized

practice resulted in many headaches. That profession is now having difficulty resolving the problems created by the piecemeal approach to specialization and its control.

One of the problems in today's specialization is the fact that anybody can be a specialist. All he has to do is to say, "I am a specialist in some field of law." He doesn't have to know anything about that field. He can advertise in the law directories. Other lawyers and the public have no way of knowing whether or not he knows anything about that field. What is needed is a program that will control and eliminate the vices of specialization and yet give to the public and the profession its benefits.

The most important component of a specialty control program is an agency or agencies to establish the standards for those who would claim to be specialists. The two aims of such standards should be (1) making better lawyers, and (2) preventing the "in-looking" specialists. One of the great achievements of the medical profession's specialty program is the increase in the competence of the medical doctor in the various specialty fields as a result of additional education. If the law schools are not ready to carry this added burden, they should be advised that the profession thinks that it is imperative, not as additional requirements to undergraduate legal education, but as a new and different type of advanced training at the graduate level. This must be considered as something in addition to general legal education. Better professional men, not trade school hacks, are needed.

The requirement of standards meets the problem squarely. Only those who can meet the requirements will become members of specialty groups. This in no way changes the right of any lawyer to selective listing in the law directories, but it will produce a group of lawyers who have met certain standards, who will become known to the profession to be reasonably proficient in that specialty.

The key to the whole problem is the establishment of specialty organizations within the framework of the organized Bar, guided and controlled by the agency of the organized Bar. Membership in such specialty organizations will be on a voluntary basis and will be open to those who can meet the standards of education, practice, and proficiency. No one will be prohibited from practicing law in any specialty field. No organization outside of the organized Bar will be directly affected. The control and guidance of specialization will not depend upon force but will depend upon the fact that the legal profession will recognize that members of specialty groups have met certain additional minimum standards and are therefore capable of being of real assistance to other members of the profession and the public. Lawyers will turn to the members of the controlled specialty organizations when they need help in a special field. Membership in a specialty organization will not depend upon a lawyer's own assessment of his ability but upon his meeting certain limited, minimum standards of practice, proficiency, and education.

A Special Committee of the American Bar Association on Specialization and Specialized Legal Education worked for more than a year on a solution to the problem. The recommendations of the Committee as amended by the Board of Governors were adopted at the March, 1954, meeting of the House of Delegates of the American Bar Association. The recommendations adopted read as follows:

1. That the American Bar Association approves in principle the necessity to regulate voluntary specialization in the various fields of the practice of the law for the protection of the public and the Bar; and

2. That the American Bar Association approves the principle that in order to entitle a lawyer to recognition as a specialist in a particular field, he should meet certain standards of experience and education; and

3. That the implementation, organization and financing of a plan of regulation to carry out such principles is delegated to the Board of Governors, subject to final approval by the House of Delegates.

The President appointed a Special Committee of the Board of Governors to make detailed recommendation as to devices to carry out the recommendations of the committee and the mandate of the House of Delegates. Although they have been withdrawn, the carefully drafted recommendations of this committee are found in the advanced program of the 1954 Annual Meeting of the American Bar Association on page 88. The proposals are simple and are essentially as follows:

(A) A Council of Legal Specialists of nine members is to be created. This proposed Council is the general control agency, is a creature of the organized Bar, and is responsible to the profession as a whole and the public. Its purposes are to make the necessary investigation to determine the fields of specialized practice to be approved and the specialty societies to be recognized in such fields and to establish general standards applicable to all societies.

(B) Specialty societies are authorized in each approved specialty field. After a field of law has been approved by the Council for the creation of such a society, the lawyers in that field and the existing organizations will form a specialty society in accordance with the general standards of the Council. Such societies will be proficiency groups with standards of education, practice and proficiency. Individual lawyers meeting the standards for membership in the society will be admitted to membership.

Thus there are provisions for the creation of two agencies, all under the general control of the American Bar Association: (1) The general controlling agency known as the Council of Legal Specialists, which will give guidance and control to

each of the various specialty societies, and (2) In each of the special fields where the council thinks specialty groups are needed, there will be an American Society of ———— Lawyers. This society will have individual lawyers as members who have met the prescribed standards of education, practice and proficiency.

It is fair to ask, "Will this scheme work?" "Will it control specialization?" "Will it give direction to it?" "In what respect will it change the present picture?" The important features of this scheme of control and guidance are that it is entirely voluntary and its effect on the problem at hand will depend on increased proficiency rather than force.

This approach views the problem, not as one of ethics to be solved by negative injunctions, but as one to be solved by providing devices to make lawyers better able to help clients. Nothing in the suggestions will prevent any lawyer, general practitioner or specialist from practicing law as he desires. This is not an effort to carve out areas of the law and say, "Only specialists may enter." This would not be sound. A person who is not a member of the society in a field of law will still be able to state in *Martindale-Hubbell* that he practices any branch of law. But these self-proclaimed protestations of competence will become less and less meaningful and effective as the quality of the societies increases. Instead of looking for self-proclaimed specialists, lawyers in referring business or forming *ad hoc* partnerships will look to see if the other is a member of the proper society.

The medical profession is not the pattern for this organization. But we can learn from its short-comings and avoid them. Nothing, for example, would require a person to devote all of his time to his specialty. There is no reason why a lawyer could not carry on what he thinks of as a general practice; but if he has demonstrated extra competence in a special field, he may become a member of one of the specialty societies.

Over-specialization in medicine resulted in part from the failure of the profession to control it during its formative years. Professional control of specialization now, not ten years from now, can prevent over-specialization and the destruction of the general practitioner. The general practitioner and the specialist, as well as the public, will benefit by recognizing the problem and moving in on it before it is too late.

The plan before the American Bar Association contemplates that a detailed study of all aspects of specialization will be required before it can be implemented fully. If the plan is adopted, the first obligation of the Council of Legal Specialists will be to conduct such a study. If the plan is not adopted, it should be clear that steps should be taken immediately to establish and finance a study group to lay the ground work for the ultimate guidance and control of specialization.

The cost of this study will be substantial, but it must be thoroughly done if the control program is to rest on a sound foundation. The Survey of the Legal Profession is a starting point. However, it should be considered only as a point of departure. Necessary detailed field studies will involve consultation with many lawyers, law teachers and laymen. Studies will have to be made as to the methods of controlling specialization in other professions and as to the effects on the profession and society.

If the study is to be made before the adoption of the plan hereinbefore outlined, steps must be taken immediately to establish and finance such a study group. Time is important. Unofficial specialty organizations or clubs are springing up in many fields of practice. We must not wait. We must move now with vigor, otherwise we may be faced with the same situation that faced the medical profession twenty years ago.

Wisdom is required to devise and operate a plan of specialization control. As important as wisdom is courage. Courage is required to face the problems of specialization today, to deviate from the status quo, and to adopt a device that will preserve general practice as we know it, preserve and improve the benefits of specialized practice, and bring specialty control on a voluntary basis under the general direction of the organized Bar.

The Bar in Canada

(Continued from page 1120)

a particular lawyer to act for him throughout.

Some inquiry was made to see if it would be possible for the Law Society or a Judge of the Court concerned to grant a limited right of practice or audience in particular cases. It was felt, however, that this was not possible having regard to the strict terms of the Barristers Act and the Solicitors Act which I mentioned earlier in my remarks. Further consideration must be given to this problem since with increased population, wider distribution and greater complexity of business and the disappearance of boundary lines because of more rapid transportation, it will become more pressing and require a solution.

In passing, I should mention that barristers and solicitors in any province in Canada can practice in the Supreme Court of Canada and in the Exchequer Court of Canada as of right without any further call or presentation.

There is in Canada a voluntary organization composed of representatives of the ten provincial law societies known as the Conference of the Governing Bodies of the Legal Profession in Canada. It meets annually at the same time and place as the Canadian Bar Association. It disseminates knowledge of the activities of each provincial society, discusses common problems, and makes suggestions and recommendations. It has proved useful in helping to solve many of the problems which have arisen from time to time.

Having regard to the highly organized state of the provincial and community bodies of the legal profession in Canada, any further organization or association might have seemed to be unnecessary but this was not so. There was need of a national association in Canada and that need was and is well stated in the objects of the Canadian Bar Association—to advance the science of jurisprudence; to promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces; to uphold the honor of the profession of the law and foster harmonious relations and co-operation among the incorporated law societies, barristers' societies, and general corporations of the Bars of the several provinces, and cordial intercourse among the members of the Canadian Bar; and to encourage a high standard of legal education, training and ethics.

Spurred on by the inspiration and history of achievement of your great Association, Sir James Aikins, of Winnipeg, called together leaders of the Bar in Canada and was responsible for the formation of the Canadian Bar Association in 1914.

We lawyers of Canada are proud of the history of the Canadian Bar Association and of the place it now occupies in the life of our country. While it is a purely voluntary association, the lawyers in two provinces, British Columbia and, more recently, New Brunswick, have seen fit to provide for complete membership of their Bar by arranging for collection of the annual Canadian Bar Association fees with their own annual Law Society fees. This was done by amendments to the provincial statutes after approval by the provincial Bars as a whole. Compared to your large membership, the membership of 6,000 in the Canadian Bar Association is small. It does represent, however, approximately 50 per cent of the total number of lawyers in Canada. We are delighted that without any active membership campaign it has shown a large and healthy increase each year.

At the moment, we are suffering from growing pains and have the problem of co-relating the work of the Canadian Bar Association with that of the provincial law societies in order that the public and the profession will obtain the maximum benefit.

The great impetus in the work of the Canadian Bar Association in the last few years has been in its sections and committees. They have no continuing permanent membership or annual fee. Their officers are elected, usually each year at the Annual Meeting. It is apparent that because of the lack of continuity and the time required to organize each year, the full benefit possible from the work done in the sections and committees is not being realized.

Whether or not we have reached the stage in our development when a permanent membership and fee for each Section should be set up is a matter for our immediate consideration. Certainly, your experience in this regard will be of great assistance in solving the problem which we now face.

Two matters of great importance are of interest and concern to both the provincial law societies and the Canadian Bar Association. They are the ethics of the profession and the public relations of the profession and these are closely related. Whatever one lawyer does in any part of Canada has, of course, its effect on all lawyers in Canada. Indeed, so closely are our two countries tied together by the press, radio and television that the actions of lawyers in either country cannot but help affect the standing and position of all lawyers in both countries.

It has been said that the public relations of the profession depends upon the public relations of each individual member of it. That is why the maintenance of the ethics of the profession is becoming increasingly important. I have heard many discussions on how ethics can best be taught—whether by precept and example, or in the lecture class. In my opinion, both are required. It would appear that, with the great expansion of the profession, many senior members of the Bar have not the time, or are not taking the time, to instill into juniors the high principles which have governed the Bar in both our countries in the past.

In addition, it would appear that many of our law schools are not fulfilling their obligation in this regard.

True, the complexity of practice today, the pace of modern business and the burden of academic training is making this increasingly difficult.

But that is no answer.

Consideration of legal ethics and the public relations of the profession will occupy an important place on the agenda for our Annual Meeting in Ottawa next week.

The justification of the privileges we enjoy and the position we occupy as members of a learned profession is our service to the public. We are all proud to be members of the legal profession. We are conscious of its history, its traditions, its service to the public and the contribution its members have made in every field of community and national endeavor.

Our aim must be to so organize and govern our profession that our traditions and position as members of a learned profession will be maintained and our service to the public, both individually and in our various associations, will be enhanced.

Our two associations—the American Bar Association and the Canadian Bar Association—occupy an important place in the life of our countries. It has been attained by wise leadership and devoted service. An Annual Meeting such as this cannot help but be an inspiration to every member of your Association and a great impetus to its future success. I am grateful for the privilege of being present and taking some small part in it.

The SEC and the Federal Judiciary

(Continued from page 1139)

must be prepared by the trustee and transmitted to creditors and stockholders, who may then submit to the trustee suggestions for a plan (Section 167). The trustee has the primary responsibility for preparing a plan (Section 169). When this is filed, a hearing is held, on notice to all creditors and stockholders, and any objections, amendments and other proposals are heard (Section 169).

Where the debtor's liabilities are more than $3,000,000, the judge *must* refer the plan or plans he regards worthy of consideration to the Commission for an advisory report; where the liabilities are less than $3,000,000, he *may* do so (Section 172). The judge fixes the time within which the Commission's report is to be filed, or its notification that it will not file a report (Section 173). Thereafter the judge approves the plan or plans determined by him to be fair and equitable, and feasible. The approved plan or plans are then submitted to creditors and stockholders for their vote (Section 174). At the same time, they are given the judge's opinion and the Commission's report, if any, together with such other material authorized by the judge (Section 175). After the vote is taken, the judge confirms the plan if he is satisfied that the plan is fair and equitable, and feasible; acceptances by the required majorities of creditors and stockholders are in good faith; all payments for fees and expenses are disclosed and have been or will be approved by him; and the appointment of the new management is equitable, in the interests of creditors and stockholders and consistent with public policy (Section 221).

Section 208 of Chapter X provides that the Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file its appearance in a Chapter X proceeding. It is thereupon deemed to be a party in interest with a right to be heard on all matters arising in such proceeding but has no independent right to appeal. According to the Congressional Committee Report, the Commission's intervention is in the interest of adequate representation of the public interest and for the purpose of regularizing its assistance to the courts. (Sen. Report 1916, 75th Cong., 3d Sess. April 20, 1938). Implementing its advisory function under Chapter X, Section 265a and other sections provide for the transmission of notices of important hearings and of important documents in all Chapter X proceedings to the Commission.

As a general matter, the Commission has deemed it appropriate to seek to participate only in proceedings in which a substantial public investor interest is involved. Where special features indicated its desirability, the Commission has become a party to smaller cases. Through its nationwide activity and continuous experience in bankruptcy reorganization the Commission has been able to encourage uniform and appropriate application of the principles and policies of Chapter X. The Commission has often been called upon by judges, referees, trustees and parties for advice and suggestions, even in cases in which it has not participated. In the latter cases, where important questions of general interest in Chapter X have arisen, the Commission on occasion has filed a brief with the district or appellate court as *amicus curiae*.

In the period since the enactment of Chapter X the Commission has been a party to more than three hundred Chapter X proceedings involving stated assets of more than $3,000,000,000 and stated liabilities of more than $2,000,000,000. In recent years, due to the fortunate position of American industry in general, the Commission's Chapter X activities have been reduced to a minimum and we at the Commission hope that this trend will continue. Be that as it may, during this current fiscal period the Commission has had only two occasions when it has determined it necessary to file its appearance in new Chapter X proceedings.

Since its participation in Chapter X proceedings in 1938, the Commission has issued thirty-two advisory reports and twenty-four supplemental advisory reports. While these formal advisory reports represent only a small portion of the work of the Commission in Chapter X proceedings, nevertheless, the advisory reports occupy a prominent position in the reorganization field. Generally speaking, an advisory report is prepared only in a case involving a large public investor interest and in which significant problems exist. In many cases, even though the corporation is of significant size and importance, because of the exigen-

cies of time or for other reasons Commission counsel makes detailed oral presentation of the Commission's views and the reasons therefore. Similarly, in the smaller cases, the Commission's views are given orally by counsel.

The weight given to the Commission's recommendations in Chapter X proceedings is illustrated by the following statement by the United States Court of Appeals for the Second Circuit in a recent case:[11]

> Naturally careful consideration is due the conclusion of the able district judge who has had this lengthy reorganization so long under his control. At the same time we cannot overlook the fact that the governmental agency charged with substantial responsibility in the premises, the Securities and Exchange Commission, has made an extensive investigation resulting in a detailed and helpful report with a reasoned conclusion which the trial judge has rather summarily rejected. If the considered findings of this agency, with so much better facilities for investigation than those possessed by either this or the trial court, are to have any force beyond their initial impact below, then we think that they will largely offset the usual presumption accorded a decision of first instance. Otherwise much of the statutory purpose in creating an expert body for the consideration of technical problems will be set at naught. Compare 6 Collier on Bankruptcy, Par. 7.30, 14th Ed. 1947. We have elsewhere stressed the importance of due regard for Commission findings, Finn v. Childs Co., 2 Cir., 181 F. 2d 431, 438; and we are clear that here, too, we must give weight to the detailed evaluation of the facts made by this reliable and experienced public agency and the conclusion reached, even though this was not accepted by the trial judge.

In addition, a congressional committee which recently examined various functions of the Commission had occasion to request the views of the judiciary upon the Commission's activites in Chapter X cases. The Committee reported:[12]

> The judges' replies reveal a uniform belief that the Commission has been very helpful to the courts in reorganization cases. The personnel representing the Commission was found to be well informed, capable, and highly skilled. Many of the judges were impressed by and valued the Commission's comprehensive advisory reports and recommendations. The Commission was reported to be diligent in its function of protecting the rights of the various security holders, and beneficial to all parties concerned. Accordingly, the subcommittee commends the Commission for the effective and able manner with which it has carried out its duties and responsibilities under Chapter X of the Bankruptcy Act.

Within the past year the Commission has found it necessary, largely because of budget considerations, to re-examine its functions under Chapter X of the Bankruptcy Act, particularly in those areas in which its participation is discretionary. In view of the obvious impact upon the workload of the federal courts of any curtailment of the activities of the Commission in Chapter X proceedings, whether by legislation or by administrative determination, we decided to invite the views of the federal judiciary as an aid to the Commission's re-examination of its functions in Chapter X proceedings.

Accordingly, at the meeting of the Judicial Conference held in Washington in September, 1954, representatives of the Commission appeared and recommended that the Judicial Conference circulate to each federal judge in the country a questionnaire seeking specific comments upon the functions of the Commission in Chapter X proceedings. We emphasized that what we want are frank, critical comments by the federal judiciary upon the functions of the Commission in Chapter X proceedings, with special emphasis upon those functions which, in the view of the federal judiciary, the Commission appropriately could curtail without unduly increasing the burden of the federal courts and without prejudicing the public interest. I might say that Chief Justice Warren was particularly cordial to the idea of submitting the proposed questionnaire to the federal judiciary and he was most helpful in arranging for the appearance of representatives of the Commission before the Judicial Conference.

After the matter was presented on behalf of the Commission and following some questions and discussion by members of the Judicial Conference, the Conference, upon motion made by Chief Judge Magruder of the Court of Appeals for the First Circuit, seconded by Chief Judge Stephens of the Court of Appeals for the District of Columbia Circuit and unanimously carried by the Judicial Conference, authorized the Director of the Administrative Office of the United States Courts to circulate the proposed questionnaire to all federal judges.[13] This questionnaire has been sent to the federal judges, together with copies of the report of the Judicial Conference. Responses have been received from most of the federal judges. When tabulated and analyzed, the results will be submitted in the form of a report to the Bankruptcy Committee of the Judicial Conference. Our Commission then intends to consult with the Bankruptcy Committee for the purpose of determining what administrative action, if any, the Commission may appropriately take, as well as what legislative measures possibly may be proposed, to adjust the functions of the Commission under Chapter X in the light of sixteen years of practical experience, particularly as viewed by the federal judiciary.

This effort on the part of the Commission to re-examine its functions under Chapter X of the Bankruptcy Act is, I think, a striking illustration of effective co-operation between the Commission as an agency of the executive branch of the Government and federal judiciary.

Major Litigation . . . *Some Recent Cases*

Finally, I should like to comment very briefly upon several interesting cases now pending in the federal courts in which the Commission is involved.

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11. *Conway* v. *Silesian American Corporation*, 186 F. 2d 201, 202-203 (1950).
12. H. Rep. No. 2508, 82d Cong., 1952, page 134.
13. Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 22-24, 1954, Washington, D.C., page 32.

Within the past year a number of cases have been decided by several of the United States Courts of Appeals which have pretty well settled the question of whether a registered parent holding company is entitled to reimbursement from its registered subsidiary holding company for expenses incurred by the parent in the reorganization of the subsidiary under Section 11(e) of the Holding Company Act. The Court of Appeals for the Third Circuit in *The United Corp.* v. *SEC (Public Service Corporation of New Jersey)*,[14] and the Court of Appeals for the Eighth Circuit in *Standard Gas & Electric Co.* v. *SEC*,[15] have upheld the Commission's refusal to allow such reimbursement. The Supreme Court denied certiorari in each of these cases.[16] Likewise in the Court of Appeals for the First Circuit in *Koppers Co.* v. *SEC*[17] and the Court of Appeals for the Second Circuit in *The United Corp.* v. *SEC (Niagara Hudson Power Corp.)*[18] have upheld the Commission's refusal to allow such reimbursement.

In *SEC* v. *Drexel and Co.*, the Court of Appeals for the Second Circuit reversed the Commission and held that it had no jurisdiction to pass upon a fee paid by Electric Bond and Share, a registered parent holding company, to Drexel & Co., its financial adviser, for services rendered in the reorganization of Electric Power & Light Corp., a subsidiary of Electric Bond & Share, under Section 11(e) of the Holding Company Act.[19] The decision by the Second Circuit, in the view of the Commission, represented a direct challenge to the jurisdiction of the Commission in a critical area of its functions under the Holding Company Act. For this reason we sought and obtained from the Supreme Court a writ of certiorari. The case was argued in the Supreme Court on February 9 of this year. On February 28, by a 6-2 vote, the Court reversed the Second Circuit, holding that the Commission does have jurisdiction to pass upon the Drexel fee.[20]

United States v. *T. M. Parker, Inc.*[21] involves the first effort by the United States to extradite Canadian citizens under the 1952 amendment to the Canadian-United States Extradition Treaty. The amendment to the treaty represented the culmination of many years of efforts on the part of the Commission to plug a loophole in the enforcement of the United States securities laws.

Shortly after the enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the creation of the Securities and Exchange Commission in 1934, there was an exodus of fringe securities operators from this country to Canada. From Canada they were able to peddle, with the aid of the telephone and the mails, securities from Canada into the United States in total disregard of the American securities laws and the regulations of our Commission. For years our Commission has been powerless to correct this situation for the reason that extradition from Canada of persons indicted for violation of the American securities laws was impossible. Extradition was impossible because the Canadian courts held that violations of the mail fraud and other anti-fraud provisions of the United States laws were not covered by the treaty. After many years of patient negotiations between representatives of the United States Department of Justice, the United States Department of State and our Commission, on the one hand, and the appropriate Canadian officials on the other hand, agreement was reached with Canada to amend the treaty to cover these offenses. Accordingly, an amendment to the Canadian-United States Extradition Treaty was ratified in 1952, the Canadian mail fraud statute previously having been broadened by appropriate amendment. With this machinery established, we waited for an appropriate test case which was not long in appearing on the horizon in the form of *United States* v. *T. M. Parker Inc.*

During a six-week period in the late spring and early summer of 1953 a "boiler room" operation from Montreal resulted in the defrauding of a large number of American investors residing in some forty of our states of a total of over $300,000. Many of these investors never received even so much as a scrap of paper in return for the money they sent to Montreal. Others paid ten or fifteen times more per share than the price at which the stock could have been purchased. The fraud in short was a most aggravated, vicious form of crime.

Following a thorough investigation by our Commission, the case was presented to a grand jury in the United States District Court for the Eastern District of Michigan. Indictments were returned in April, 1954, against nine American and four Canadian defendants. The American defendants were promptly apprehended and arraigned. All pleaded not guilty and were released on bail awaiting trial.

None of the Canadian defendants, however, appeared in Detroit, relying upon what for years has constituted virtually an immunity from prosecution under the United States securities laws. Accordingly, extradition proceedings were instituted and an extraordinarily competent firm of Montreal attorneys was engaged to represent the United States Government in the extradition proceedings in Canada.

After the extradition papers inched their way through the appropriate channels in this country and in Canada, they at last arrived in the Superior Court for the District of Montreal late in October of last year. Warrants were issued for the arrest of the two Canadian defendants we were able to locate. They were apprehended and held, without bail, in the Bordeaux Jail in Montreal while the extradition hearing took place.

The extradition hearing commenced on November 3 before Associate Chief Justice Scott of the

14. 211 F. 2d 231 (3d Cir. 1954).
15. 212 F. 2d 407 (8th Cir. 1954).
16. 348 U.S. 820 (1954); 348 U.S. 831 (1954).
17. 218 F. 2d 308 (1st Cir. 1954).
18. ——F. 2d —— (2d Cir. 1955).
19. 210 F. 2d 585 (2d Cir. 1954), *cert. granted* 348 U.S. 809 (1954).
20. 348 U.S. 341 (1955).
21. E. D. Mich., Criminal Nos. 34274-34277.

Superior Court for the Province of Quebec, District of Montreal, and concluded a month later. This extradition hearing, although ostensibly a "preliminary inquiry" within the meaning of the Canadian law, actually took the form of a full dress trial of the Canadian defendants on the merits. Some forty witnesses were called by the prosecution and numerous affidavits of defrauded American investors were introduced. One of the defendants took the witness stand on his own behalf.

At the conclusion of the evidence, Chief Justice Scott announced that he was satisfied that an overwhelming case of fraud had been established by the prosecution, on the basis of which he concluded that *prima facie* violations of the United States Securities laws and mail fraud statute had been established, as well as violations of the Canadian counterparts of the United States statutes. In a judgment filed on December 17, however, the judge refused to grant extradition because he did not like the criminal procedures to which the Canadian defendants would be subjected in the United States.

Shocked by such a wholly unwarranted thwarting of the clear intention of the Canadian and United States governments as expressed in the extradition treaty between the two nations, the United States Government filed an unprecedented application with the Supreme Court of Canada for special leave to appeal from the adverse extradition judgment. After argument before the full court in Ottawa on March 7, the application for leave to appeal was denied for lack of jurisdiction.

Proceedings are curently under way by which it is anticipated that the Canadian government will make a "reference" to the Supreme Court of Canada of the fundamental question of law raised under the extradition treaty by the denial of the extradition application in this case.

If the foregoing discussion of some of the problems which confront our Commission in by far the most important area of all of the Commission's functions—that is in its relations with the courts—has served only to indicate something of the scope and magnitude of those problems, this article will not have been in vain.

Lawyers and Adoption

(Continued from page 1128)

dence. Both physician and attorney are respected members of their profession and act out of the best motives. In turn, the clients eager to adopt are referred by the attorney to the physician. Fees charged by both physician and attorney are customary and reasonable. In California an attempt is being made to amend the act governing the licensing of child-placing agencies to exempt lawyers and physicians from any licensing requirement. But sharp distinction should be made between engaging in placement activity and performing legal services. For the reasons we have indicated, we feel that placement lies outside the field of an attorney's competence. Stated in positive terms, his professional duty is to encourage his clients to rely on the advice and guidance available to them in recognized child placement agencies.

Lawyers cannot deny legal services to the large number of clients who secure children independently. The most difficult situation is one in which clients advise their attorney that a child is about to be placed in their home. These are the so-called "tagged baby" cases, babies for whom families have been selected often before birth. The client asks that the lawyer arrange to secure the consent of the mother and to do everything necessary to complete an adoption.

This situation bristles with questions. Is he serving the best interests of his clients by accepting such a case? If he accepts, should he undertake to confer with the natural mother and secure a consent? To what extent can the client make use of child placement agencies in the community? Are other resources available? If he secures the mother's consent, how can he best protect against revocation? If investigation is required by the adoption statute, what agency will investigate? If the agency which investigates makes an adverse report, what should his attitude be?

We must accept the fact that lawyers are often confronted with these questions. As long as recognized child placement agencies are without sufficient resources to handle all children of unmarried parents available for adoption, some doctors will, for some time to come, continue to make private placements. The legal profession cannot shut its doors to adoptive parents in these situations, for the individuals involved usually have good motives.

The basic problem is, however, that the method is wrong. How can the lawyer best protect the child, the natural parents, the adoptive parents, and the community? The fact is that the lawyer can only function as a lawyer; it is a hard fact, but inescapable. He can provide his experience and knowledge to bring about an adoption decree which hopefully will withstand attack. In all other areas he walks on quicksand. He can, in most instances, complete the legal process; he can seldom have the satisfaction of knowing whether the new family which he has helped legalize will experience a normal range of happiness. Many independent adoptions do work out successfully but the chances for this, according to the late Dr. Amatruda, for many years associated with Dr. Gesell in the Yale University Clinic of Child Development, are only 50 per cent.

In short, an independent adoption has the same statistical ratio of success as chance. And why shouldn't adoptive parents of children take the same chance as natural family groups? The answer lies in part in the hazards previously discussed, in part in our present knowledge about the probable causes of mental illness and delinquency. Children react to the unspoken feelings of their parents despite an outer show of solicitousness and affection which

parents may demonstrate. Feeling unloved, unwanted or unable to live up to the expectations of his adoptive parents, the adopted child may inflict upon himself the pain he feels at this discovery with resultant maladjustment or serious mental illness; or he may act out his unhappiness upon society in delinquent behavior. We know that this occurs in natural families. But the adoptive child has already lost one set of parents when he is placed with his new family.

The whole purpose of adoption is to bring together a family unit in which parents and children may find in each other a reasonable degree of pleasure. An adoptive placement must not be based upon vague fulfillment of a couple's longing for a child by placing any child in the home. It must be predicated upon the particular needs of an individual child, upon the characteristics of the family undertaking to rear him.

In some states, before a baby can be released from the hospital, a state or county agency must be notified, and an investigation made of the natural mother and of the adopting family. The period of time is, however, so constricted, since mothers now leave the hospital within five days of delivery, that there can be no significant work done in this period. Follow-up work includes physical and mental examination of the child and a recommendation to the court when the petition is filed.

When clients come to him with a plan to adopt a child as yet unborn, there may still be an opportunity for the attorney to point out the legal and practical risks. In some communities, he may be able to refer the client for advice to a family counseling agency. When the child is already in the home, there is little a lawyer can do. In certain states, there exist stopgap provisions, such as mandatory investigation by public welfare agencies. Attorneys attending the recent National Conference in Chicago sponsored by the Child Welfare League of America in January, 1955, agreed that the crucial point in the adoption process is the surrender of the child by the mother, and that if the law could throw protection about this act, much could be done towards eliminating the black market and ill-advised independent placements.

We have not discussed the role of judges in the adoption process for this is a subject worth separate consideration. Apart from seeing that the requirements of the statute are met, the judge is most strategically placed to protect the parties involved, assuming the existence of a good adoption statute. This is especially true of the independent placement. Those of us who have followed the judicial process know that in very few cases does a judge upset an independent placement. This is not said in criticism of the judges who are, as a rule, keenly interested in the child. The fact is that the case comes to the judge too late, usually months after the mother has relinquished the child and a new family unit has been formed. The alternative, disrupting the family unit at this point, may expose the child to greater changes than remaining with the family. Thus the case comes before the court without the benefit of an objective and expert appraisal of the situation. The court may be of great assistance in the more gross cases by establishing a pattern of searching inquiry with the aid of competent caseworkers and by giving weight to the recommendations.

Although we have presented last the unmarried mother who comes to a lawyer for help in placing her unborn child because this is a situation which confronts him rarely, all sound adoptions must be based on full and appropriate service to her. The problem here is almost exclusively a social problem, assuming a situation in which the father is unknown or in which there is no desire to establish obligation to support. The duty of the lawyer is clear. The client should be referred to the appropriate social agency in the community so that she can be helped to make the best plan for herself and her unborn child.

A decision to place a child in adoption must not be the hurried act of desperation. The mother's decision can become a carefully thought out plan in which her child's, as well as her own, best interests are determined. If the mother is without means, she can be referred for medical care, for guidance, and later, vocational education if this is indicated. But most important, she is not left the prey of conflicting feelings so that in her indecision she may now give up, now reclaim, the child she places in adoption, making an orderly plan for the child's care impossible. The probationary period provided by most statutes was never intended as a period during which the mother was free to change her decision to give her child up for adoption, and full casework service to her in the months before the child is born, and later if this is indicated, will avoid havoc in the life of the child and of the adopting parents brought about by a decision to revoke consent.

Over the last five years under the leadership of the Child Welfare League of America of which all child-placing agencies conforming to minimum standards are members, there has been an intensive re-evaluation of adoption practice. The 1955 Conference on Adoption reviewed current practice by leading child care agencies throughout the country, with the participation of experts from all the professions whose knowledge contributes to the improvement of the adoption practice. Specialists of national reputation in the fields of anthropology, genetics, law, medicine, psychiatry, psychology, religion and sociology, met in technical sessions for three days to evaluate current practice. The results were published last summer. Law and social work have much to gain from a constructive relationship in areas in which social factors play a dominant part. Efforts at mutual understanding must continue in order to strengthen the operation of the legal process in our society.

Lawyers and Accountants

(Continued from page 1116)

firm, with offices in a great many cities, both in this country and abroad. These are accounting factories far more extensive than any of the law firms which have been called law factories. Not only are they larger, but they are interstate and multi-state in their operations. These huge organizations develop techniques and efficiencies which mean that large amounts of large business gravitate to a relatively small number of firms, to an extent, I expect, far more than is true among large law offices. Although there is much competition among these several large accounting firms, it seems clear that as a group they skim a very large part of the cream from the available accounting work. When these organizations then go on and handle large and complicated tax problems, the questions presented may well be different from those which arise with the individual or small accounting practitioner. The accounting factories develop a confidence in their own ability which makes them, I would guess, much less likely to call a lawyer into matters where a lawyer probably ought to be called in than is the case with the smaller accounting practitioner.

If these firms were just accountants, that would be one thing. Some of these firms, however, have, I am told, law departments, where legal advice is given. Sometimes these law departments do extensive tax planning. When the accountants working for this firm in Phoenix encounter what they feel to be a tax problem, they may not call in a Phoenix lawyer, but rather send the whole matter to their firm's legal department which may be in New York. Thus we have something developing which is pretty close to the corporate practice of law, and I think it is bad. Perhaps this is a matter which is worth looking into.

This leads to a closely related question which is, I know, a very touchy one. Again I want to say that I know that I may not have thought of all aspects of the question. All I am trying to do is to raise the question for consideration. I am not making charges of any sort against anyone. I am merely saying that here is something that seems to me worth careful consideration.

What I have in mind is lawyers working for accounting firms. This divides into two aspects, I believe. There is, first, the accountant who practices as an accountant, but who is also a lawyer. There is, second—and this may be rare, but I am not sure that it does not exist—the lawyer who is hired as a lawyer by an accounting firm. My own present reaction is that the latter is an exceedingly doubtful practice. I have not been able to see myself why such employment is not unethical. Why does it not amount to solicitation of law business by the lawyer involved? He does not get his own business. The business is obtained by the accounting firm, a lay organization, and is then referred to him. Moreover, the accounting firm charges the client and the lawyer often receives a salary. Insofar as the lawyer is performing legal services and is hired because he is a lawyer—and this may well be a proper description of the handling of much tax work—is not such an arrangement a clear violation of the Canons of Professional Ethics? It seems to me that the American Bar Association and the American Institute of Accountants might well examine this situation, and might clarify the present Canons, and make it clear and explicit that a lawyer cannot properly be employed as a lawyer by an accounting firm.

Of course an accounting firm could hire a lawyer to advise it on its own legal problems. But that is not the situation to which I refer. What I have in mind are lawyers who perform legal services for clients of the accounting firm. This seems to me to be clearly improper, no matter how much indirection may be involved in doing it. This also applies to the legal departments of huge accounting firms, which render legal opinions, and make legal suggestions, and draft papers, for the accounting firm's various local offices. It may be denied that this is done, or that such legal departments exist. No doubt they are not usually called that. I think the whole matter may warrant careful consideration, and the American Institute of Accountants should be as much concerned about it as the American Bar Association.

Now let me return to the matter of the accountant who is also a lawyer. Here again, it seems to me, there may be a real problem, though perhaps not so clear and difficult a problem as the one to which I have referred. If a lawyer holds himself out as an accountant, too, is he in effect soliciting law business? Is he acting improperly if, when a clear legal question arises in his accounting practice, he renders a legal opinion, or takes the case into court, or drafts legal documents? I am not sure about this, but I think it is a very doubtful practice. I heard a while ago about a lawyer who was also an accountant and a partner in an accounting firm. He said that there was nothing wrong with what he did, because whenever he rendered a legal opinion, he always put

it on a separate letter head! I suspect that there may be a good deal of this sort of thing going on. It seems to me that here again it may well be worth looking into this problem, and clarifying the applicable rules and standards, preferably by action by both the American Institute of Accountants and the American Bar Association.

One suggestion occurs to me, which may or may not be practical. It is an analogy to a practice in the State of New South Wales, where they have both branches of the legal profession, the barristers and the solicitors. A person cannot be both at once, but there is considerable freedom in transferring from one branch of the profession to the other. If a solicitor wants to become a barrister, he has himself stricken from the roll of solicitors when he is admitted to the Bar, and then he cannot practice as a solicitor. If, however, he does not find being a barrister to his liking, he can resign from the Bar, and have his name restored to the list of solicitors. What is clear is that he cannot do both things at once.

I wonder if something along the same line would not be useful here. It seems to me fairly clear, though there is certainly room for discussion, that a man should not practice both as an accountant and as a lawyer at the same time. Could we not work out a system under which an accountant-lawyer who wanted to practice as an accountant could have his membership in the Bar suspended? While it was suspended, he would not be a lawyer, and could not properly practice as a lawyer. On the other hand, if he preferred to be a lawyer, he could have his status as an accountant suspended. If his choice did not work out, he would be free to change from one to another, after a proper interval.

What is needed in this area it seems to me is a fairly complete separation between accountants and lawyers. An accounting firm should practice accounting, and by this I mean to include substantial activity in the tax field, but done as an accountant does it, by a person who holds himself out only as an accountant. An accounting firm should have no employed lawyers, and should not be in a position to represent directly or indirectly that it is able to provide legal opinions or to give the services of a lawyer. Similarly, lawyers' firms should not undertake to render the services of accountants—though I do not believe that they do now. If accounting firms really restricted their activities to accounting services, and were clearly debarred from the use of lawyers as employees or partners, then the public could choose the type of service it wants in a much clearer cut way than is apparently the case at present. In my former speech on this subject, I included a sentence to the effect that it seemed to me that the matter between lawyers and accountants might well be left to the ordinary channels of competition, that is, that the clients might well be left to choose whether they wished to be served by an accountant or by a lawyer. In making that suggestion, however, I definitely had in mind that the choice should be between accounting services and lawyer's services, with no hybrid services to be offered, directly or indirectly, by the accounting firm.

Whether these observations add up to anything or not, I do not know. Some of the points made seem to me to be worth further consideration and perhaps investigation. Perhaps a resolution of some of these collateral questions might go far towards a solution of the basic problems which have been troubling the accountants and the lawyers over the past several years.

In closing, I would like to repeat what I said at the beginning. It is a great mistake, I think, to blow this question up to too great importance. In my experience, lawyers and accountants have got along very well together, each performing a specialized service of complexity and importance to his clients. In the tax work I see being done, I know of very little friction between lawyers and accountants. If people would cease being excited, my guess is that the situation would move along with considerable satisfaction to the clients, and with little difficulty for the two professions, for a long time. It is my own conviction that it would be very wise if the American Institute of Accountants would relax and call off its activities, and let things go along for a while without much concern on its part. The Institute should always be free to bring to the attention of the Bar Association any situation where it really feels that its members are being improperly restricted, and the Bar Association should be prepared to act promptly and generously whenever any such situation is actually presented. This is a great country, and I get the impression that accountants, with very few exceptions, are doing what they want to do without harassment. This is an area where it is extremely difficult to lay down explicit rules.

Wouldn't we all be better off if we would just let well enough alone?

Consular Non-Reviewability

(Continued from page 1112)

be appointed by the President and confirmed by the Senate[50], and to establish a Board of Visa Appeals within the State Department.[51] The recommendations of the Hoover Commission on the Organization of the Executive Branch of the Government would abolish consular absolutism by transferring the consuls' visa-issuing functions to the Department of Justice[52] whose actions in immigration matters have been subject to review.

A Historical Accident . . . *Non-Reviewability Unjustified*

The finality of consular visa denials is an example of what the President's Commission on Immigration and Naturalization called "hardly more than a historical accident which has become, to some, a principle".[53] Why has this "historical accident" been continued and strengthened in the 1952 Act? The most recent explicit justification appears in the report of the Senate Judiciary Committee:[54]

> The subcommittee concludes, however, that to allow an appeal from a consul's denial of a visa would be to make a judicial determination of a right when, in fact, a right does not exist. An alien has no right to come to the United States and the refusal of a visa is not an invasion of his rights. Permitting review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws. It is the opinion of the subcommittee that the question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer.

An answer to this attempted justification of administrative absolutism could be along the following lines:

> *First:* An alien has no right to come to the United States and the refusal of a visa is not an invasion of his rights.

No argument is here being made that an alien outside of the United States has constitutional rights of review. The exclusion of aliens, and the terms regulating their admission, have long since been recognized as fundamental attributes of sovereignty.[55] The issue here posed is not whether the alien *has* a constitutional right but whether he *should* be given a statutory right. The present situation does violence to American traditions and legal principles and to the equitable, proper and just administration of the law.

Nor is this the place to document the possible constitutional rights of American sponsors of aliens. Suppose, for example, under the procedure referred to earlier, an American citizen obtains the Attorney General's approval of a petition for a preference quota visa for his alien wife. If the visa is granted by the consul, but admission is denied by the Immigration Service at the port of entry, there is protection to the citizen-husband's rights through hearings afforded the alien wife at the port of entry, and by subsequently available appeals and review. But, if the visa is denied by the consul, despite the statutory provision that the Attorney General's determination of the interpretation or application of any immigration law is supposed to be controlling upon the heads of all other departments or agencies,[56] there is no semblance of a fair hearing and the citizen-husband's rights are foreclosed. This in the face of the fact that a federal court has said, in a deportation proceeding involving an alien wife:[57]

> Her husband is not before the Court, but his rights as well as hers, are involved.

It has also been held that the right of a husband to the society of his wife is a property right.[58] What protection is there to the property rights of the husband-sponsor in the present non-reviewability of a visa denial to his alien wife?[59]

Or, to take another way in which the sponsor's right could arise, suppose the Hutterian Brothers, a pacifist sect, sponsored an alien who was denied a visa solely because of his membership in the sect. Would the sponsor be able to obtain judicial relief in view of the opinion rendered by the Attorney General to the Secretary of State that there was "no statutory authority" for such denial?[60]

> *Second:* . . . would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws.

50. S. 1206; H.R. 4430, 84th Cong., 1st Sess.
51. S. 519; H.R. 557, 84th Cong., 1st Sess.
52. The Commission on Organization of the Executive Branch of the Government, Report on Foreign Affairs (1949), page 34; Concluding Report (1949), page 57.
53. Pres. Comm. Rep., *op. cit. supra* n. 19, at 134.
54. *Op. cit. supra* n. 19, at 622. *See* also, Minority Report on H.R. 11552, H.R. Rep. No. 1193, Pt. 2, 72nd Cong., 1st Sess. (May 6, 1932); *Hearings before House Committee on Immigration and Naturalization*, "Review of the Action of Consular Officers in Refusing Immigration Visas", on H.R. 8878, 72d Cong., 1st Sess. (March 16, 1932), at page 11 *et seq.*
55. *U.S. ex rel. Knauff v. Shaughnessy, supra* n. 36; *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L. ed. 956 (1953); 36 Col. L. Rev. 1355 (1936).
56. Act of 1952, *supra* n. 9, §103(a).
57. *Tsoi Sim v. United States*, 116 Fed. 920, 925 (1902).
58. *Tinker v. Colwell*, 193 U.S. 473, 484, 24 S. Ct. 505, 48 L. ed. 754, 759 (1904); *Dorto v. Clark*, 300 Fed. 568, 571 (1924), *aff'd* 5 F. 2d 596 (1st Cir. 1925).
59. *See* Hearings, *op. cit. supra* n. 10, at pages 31, 36.
60. 39 Ops. Att'y. Gen. 509 (1940). Would *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. ed. 817, 846 (1951) be relevant to this issue?

This attempted justification is without merit: (1) There is always the possibility of authorizing administrative review, without judicial review, as recommended by the President's Commission on Immigration and Naturalization.[61] (2) There is nothing unusual about non-resident aliens litigating in our courts. It is being done regularly under the immigration laws in exclusion cases. And the writ of habeas corpus has long since been available to persons seeking admission to the United States who claim to be American citizens.[62] (3) Review of consular visa denials would improve, rather than impede, the administration of our immigration laws, according to the Senate Committee on Immigration, when it approved a bill to set up such administrative review, within the Department of State:[63]

> Interested persons constantly claim that the system is a faulty one because there is no uniformity of requirements among the various consulates throughout the world. Some solution of this problem is deemed absolutely necessary for a proper enforcement of the immigration laws and it is believed the only solution of the problem is to give to applicants for visas the right of appeal to a central body. . . .

And Mr. Justice Frankfurter has put it thus:[64]

> Let it not be overlooked that due process of law [[65]] is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration.

Review would improve the administration of visa issuance not only by guaranteeing uniformity of interpretation and application of the law, but also by assuring a more deliberative basis for consular action.[66] (4) Actual experience has shown that administrative review of consular visa actions is not only feasible and practical but is also in the public interest. During World War II, elaborate procedures were set up to review substantially all visa applications, the review being limited to security factors. Three distinct levels of visa review bodies were established, culminating in a Board of Review, composed of Presidential appointees, which decided cases on the record. Over a three and one-half year period, the Board considered 22,622 cases in an eminently successful manner.[67]

The war experience is also confirmed by peace-time procedures. Present State Department regulations require all cases of defectors from communism to be referred to the Secretary of State "for possible consultation with the Attorney General."[68] If such review is necessary for the proper determination of factual issues of defection, how much more so is this true in even more complicated factual questions and in technical or unresolved questions of law?

While passports are beyond the scope of this article, the history of the review of passport refusals has distinct relevance. The issuance or refusal of passports—like visas—is generally deemed to be within the discretion of the executive department[69] and for years the State Department made findings of fact and conclusions of law in connection with passport applications without formal hearings.[70] In the past year, however, the Courts have held that[71]

> . . . the discretion residing in the Secretary . . . is subject in its exercise to some judicial scrutiny. . . . Discretionary power does not carry with it the right to its arbitrary exercise. Otherwise the existence of the power itself would encounter grave constitutional doubts. . . .

The exercise of the discretion to issue passports has been judicially held to be subject (1) to procedural due process (and the requirements of a quasi-judicial hearing with decision based on the record and the reasons for denial made public "with particularity")[72] and (2) to substantive due process (in connection with the validity of the reason for denial of a passport)[73].

> *Third:* . . . the question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer.

Suppose, however, the discretion is abused? Suppose the consul's action is demonstrably wrong in fact, or is arbitrary, capricious, unreasonable, or beyond the scope of authority or otherwise illegal? "The objection to judicial restraint of an

61. Pres. Comm. Rep., *op. cit. supra* n. 19, at 170-71. See also annotation, "Due Process in proceedings to exclude or deport aliens—Supreme Court cases", 94 L. ed. 328, 330 (1950); *Hobby* v. *Hodges*, 215 F. 2d 754, 758 (10th Cir. 1954).

62. *Johnson* v. *Eisentrager*, 339 U.S. 763, 769-770, 70 S. Ct. 936, 94 L. ed. 1255 (1950).

63. S. Rep. No. 504 (on. S. 34), 72d Cong., 1st Sess. (April 4, 1932).

64. *Shaughnessy* v. *U.S.* ex rel. *Mesei*, *supra* n. 55, at 224, dissenting.

65. For the purposes of this discussion, substitute the word "review" for the words "due process of law".

66. In the displaced persons program, consuls were required to submit to the Displaced Persons Commission a written report of the reasons for visa rejections and the evidence upon which they were based. 8 CFR 705.2(b); Displaced Persons Commission, The DP Story 311 (1952).

67. Pres. Comm. Rep., *op. cit. supra* n. 19 at 148-49; *Pres. Comm. Hearings*, *op. cit. supra* n. 19, at 1889.

68. 22 Code Fed. Regs. 42.43a(5).

69. 3 Hackworth, Digest of International Law (1942) 467-68; *Passport Denied*, 3 Stan. L. Rev. 312, 324 (1951); *Passport Refusals for Political Reasons—Constitutional Issues and Judicial Review*, 61 Yale L. J. 171 (1952); 13 Ops. Att'y. Gen. 89, 92 (1869); 23 Ops. Att'y. Gen. 509, 511 (1901). *See* also *Perkins* v. *Elg*. 307 U.S. 325, 349, 59 Sup. Ct. 884, 83 L. ed. 1320, 1333 (1939).

70. Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 Harv. L. Rev. 608, 617 (1954). In August 1952, a Board of Passport Appeals was established, 22 Code Fed. Regs. 51.139, with authority to hear appeals from denials of applications for passports. The Board's jurisdiction includes appeals from consular denials of passports for reasons of national security and from denials of passports because of doubts as to claimed American citizenship, Pres. Comm. Rep., *op. cit. supra* n. 19, at 151.

71. *Schactman* v. *Dulles*, 23 L.W. 2665, 5 Pike and Fischer, Adm. Law (2) 217 (App. D.C. June 23, 1955, per Fahy, J.)

72. *Nathan* v. *Dulles*, 23 L.W. 2629 (App. D. C., June 2, 1955, *per curiam*), aff'g 129 F.S. 951 (1955) (denial of passport); *Bauer* v. *Acheson*, 106 F. Supp. 445 (D.C.D.C. 1952) (revocation of, and refusal to renew, passport).

73. *Schactman* v. *Dulles*, *supra* n. 71.

unauthorized exercise of powers is not weighty".[74]

Dangerous in Principle . . . *Legislation Is Necessary*

No sound or substantial reason exists for permitting consular absolutism in visa denials. "If there is any such thing as an axiom of law it is that where there is power there must be safeguards against the abuse of power"[75]. Review of administrative action is the public's chief protection against bureaucratic invasion of their rights. Unlimited or arbitrary power is inconsistent with the nature of our government and incompatible with the principles of justice.[76] If ours is a government of laws and not of men, means must be provided by law to protect people from the arbitrariness and from the errors of men who administer these laws.

But, some will ask, would you thus protect aliens outside the country? To this question, we accept Stone's affirmative answer:[77]

> Even if these laws do not infringe upon the constitutional rights of citizens and of "persons with the United States", which in many instances is doubtful, they mark an abandonment of the protection which the substantive law and the established modes of procedure have heretofore customarily thrown about the rights and liberties of the individual and they afford large scope and opportunity for violation of law and abuse of power by administrative officials.

Lawyers have a special obligation in circumstances of the kind here outlined. "The Bar . . . should be . . . the first to protest the tyranny of the abuse of power and official position."[78] The issue has broader implications than its own immediate limits. As Mr. Justice Douglas once said:[79]

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered . . . Absolute discretion . . . is more destructive of freedom than any of man's other inventions.

The thesis of this article is very simple: where government officials make mistakes of law or of fact, or act arbitrarily, beyond the scope of their authority or otherwise illegally, those adversely affected thereby should have a right of review to rectify such errors or illegal action. Therefore, whatever the constitutional situation may be, the statutory law should accord a right of review from consular *denials* of visas, just as it now provides, in effect, a review from consular *issuance* of visas.

At the 78th Annual Meeting of the American Bar Association, held in Philadelphia during August, 1955, the Administrative Law Section approved the following resolution:[80]

> RESOLVED, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:
>
> "BE IT RESOLVED, that it is the opinion of the American Bar Association that there be established a Board of Visa Appeals with power to review the denial by a consul of a visa and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

Undoubtedly there will be problems in setting up such a review. Whether review should be administrative only or judicial as well; whether the Administrative Procedure Act should be fully applicable; whether the right of review should be available to the alien or to the American sponsor; whether a special record should be developed; whether decisions on appeal from visa denials should be binding upon other government agencies involved in immigration—these and other practical administrative problems can be solved here, as they have been in comparable situations, once the basic decision is reached to provide review.

The interests of justice, the equitable and proper administration of law, and the conservation and protection of basic principles of American jurisprudence all require, in this writer's opinion, the creation of a statutory review procedure giving opportunity for appeal from denial of a visa by a consular officer.

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74. Frankfurter, concurring, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra* n. 60, at 157. *See* also NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT No. 5, page 153 (1931).

75. Professor Louis L. Jaffe, Chairman, Committee on Immigration, American Bar Association Section of Administrative Law, *Pres. Comm. Hearings*, *op. cit. supra* n. 19, at 1578.

76. *See Fong Yue Ting* v. *U.S.*, 149 U.S. 698, 763, 13 S. Ct. 1016, 37 L. ed. 905 (1893), per Fuller, Ch. J.; *U.S. ex rel. Strachey* v. *Reimer*, 101 F. 2d. 267, 269 (2d Cir. 1939), per Augustus N. Hand, Cir. J.

77. Stone, *supra* n. 1, at 61.

78. Stone, *Progress in Law Improvement in the United States*, 49 A.B.A. REP. 191, 201 (1924).

79. Dissenting in *United States*, v. *Wunderlich*, 342 U.S. 98, 101, 72 S. Ct. 154, 96 L. Ed. 113, 116 (1951).

80. See 7 ADMINISTRATIVE LAW BULL. 236 (July, 1955).

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